TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 97

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JANUARY 9, 1928

(32,100)

(32,100)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 97

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Record from the district court of the United States, district of Oregon	1
Citation and service	1
Writ of error	2
Caption	4
Record from circuit court of Clatsop County	4
Complaint	4
Exhibit "A"—Insurance policy issued to Anton Stipcich	8
Order removing cause to district court of the United States	41
Answer	42
Reply	47
Verdict and judgment	50
Motion to set aside verdict and for new trial	51
Order denying motion for new trial	53
Opinion, Bean, J., on motion for new trial	54
Orders extending time	60

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 25, 1928

Page
Petition for writ of error and order allowing same 1
Assignments of error 61
Bond on writ of error 70
Bill of exceptions 72
Caption 72
Testimony of Josephine Stuyck 73
Julius Cornely 74
W. W. Locke 75
Julius Cornely (recalled) 77
Arthur A. Hoffman 78
Hattie G. Sayre 82
Dr. Wayne J. Slater 84
Margaret L. Dunn 86
Dr. Ethel Freeman 87
Dr. J. A. Sumner 90
Dr. Edward E. Wolf 91
Arthur A. Hoffman (recalled) 96
Mrs. Josephine Stuyck (recalled) 102
Judge's certificate to bill of exceptions 114
Stipulation waiving printing of part of bill of exceptions and original exhibits 115
Præcipe for transcript of record 117
Order re original exhibits 119
Clerk's certificate 119
Proceedings in the United States circuit court of appeals ninth circuit 121
Statement of errors to be urged 121
Order of submission 123
Certificate of question to U. S. Supreme Court 123
Clerk's certificate 126
Order to send up entire record and cause 127

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

G. C. and A. C. FULTON, Astoria, Oregon, for the Plaintiff in Error.

WOOD, MONTAGUE and MATTHIESSEN, Yeon Building, Portland, Oregon, for the Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,

District of Oregon,—ss.

To Metropolitan Life Insurance Company (a Corporation), GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Josephine Stipcich is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said Dis-

trict, this 9th day of December, in the year of our Lord one thousand nine hundred and twenty-four.

R. S. BEAN,
Judge. [1*]

[Endorsed]: Filed Dec. 9, 1925.

Due and legal service of the within citation on writ of error is hereby acknowledged at Portland, Oregon, this 9th day of December, A. D. 1925.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendants.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPHINE STIPCICH,
Plaintiff in Error,
vs.
METROPOLITAN LIFE INSURANCE COMPANY (a Corporation),
Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, To the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Josephine

*Page number appearing at foot of page of original certified Transcript of Record.

Stipcich, plaintiff and plaintiff in error, and Metropolitan Life Insurance Company, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 9th day of December, 1925.

[Seal] G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: Filed December 9th, 1925. [2]

In the District Court of the United States for the District of Oregon.

March Term, 1925.

BE IT REMEMBERED, That on the 2d day of March, 1925, there was duly filed in the District Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Clatsop County, the complaint and order of removal contained therein being in words and figures as follows, to wit: [3]

In the Circuit Court of the State of Oregon for Clatsop County.

JOSEPHINE STIPCICH,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY (a Corporation),

Defendant.

COMPLAINT.

The above-named plaintiff complaining of the above-named defendant for her cause of action alleges:

I.

That the defendant is, and during all the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws

of the State of New York, and is and was at all times duly authorized and licensed to and engaged generally in the life insurance business, and at and during all the times herein mentioned was duly licensed to engage in such insurance business in the state of Oregon.

That Raymond R. Barnhardt, residing in the City of Portland, County of Multnomah, State of Oregon, is now the duly appointed and acting attorney-in-fact for said defendant under and pursuant to the laws of the State of Oregon, upon whom service of summons and complaint in all actions may be had.

II.

That heretofore, and on March 26, A. D. 1924, Anton Stipcich made due application in writing to defendant for a life insurance and life insurance policy for his life.

That thereupon, and in consideration thereof, and the payment by said Anton Stipcich of the sum of $212.48 premium, which he then and there paid to defendant, and defendant then and there received from him, and in further consideration of the agreement on his part to well and truly pay defendant a like amount upon each 26th day of March thereafter until twenty (20) full years' premiums [4] should have been paid, or until the death of said Anton Stipcich, the said defendant, on the date last aforesaid executed and delivered to said Anton Stipcich, at Astoria, Clatsop County, Oregon, its certain Endowment 20 years' Life Policy, on the life of said Anton Stipcich, in

writing, wherein and whereby defendant agreed, for the consideration aforesaid, to pay to said Anton Stipcich on the 26th day of March, A. D. 1944, if he should be then living, or upon receipt at its home office of due proof of his death at any time prior to that date, to pay to plaintiff herein, who was then the wife of said Anton Stipcich and therein named as his beneficiary, the sum of $4,000.00.

That a copy of said life policy and application aforesaid is hereunto attached, marked Exhibit "A" and made a part of this complaint the same as if set forth herein.

III.

That after the execution and delivery of said life policy, and on the 8th day of April, A. D. 1924, the said Anton Stipcich died.

That prior to his death, said Anton Stipcich had duly performed all the terms and conditions of said policy of insurance on his part to be done and performed.

IV.

That at the time of the death of said Anton Stipcich, this plaintiff was his wife, and is now his widow, and is the beneficiary named in said policy of insurance.

V.

That heretofore, and on the 22d day of April, A. D. 1924, plaintiff furnished and delivered to defendant, on form furnished her by defendant for that purpose, due proof of the death of said Anton Stipcich, and the same was duly received

by defendant at its Home Office on that date. [5]

That plaintiff duly performed all the terms and conditions of said insurance policy on her part.

VI.

That upon the delivery to and the receipt by defendant at its home office, of said proof of the death of said Anton Stipcich, as aforesaid, plaintiff demanded payment to her, as beneficiary under such policy, of the said sum of $4,000.00, but defendant refused to pay the same, or any part thereof, and no part thereof has been paid.

That prior to this action, plaintiff many times demanded payment to her of said sum due her under said policy of insurance, but defendant has ever refused to pay same, or any part thereof, and has ever since the receipt of the proof of the death of said Anton Stipcich denied all liability and obligation under such policy, and has ever since wrongfully and in violation of its obligations thereunder wholly repudiated same.

VII.

That more than eight months have expired since plaintiff furnished and filed with defendant, and since defendant received at its home office, due proof of the death of said Anton Stipcich.

Therefore, plaintiff is entitled to recover from defendant, in addition to the amount due her under said policy as aforesaid, such sum as the Court or jury may adjudge reasonable as attorney's fees in this action.

That the sum of $750.00 is a reasonable sum as attorney's fees in this action.

VIII.

That plaintiff is entitled to interest on said sum of $4,000.00 from the 22d day of April, A. D. 1924, at the rate of 6% per annum until paid.

WHEREFORE, by reason of the premises, plaintiff demands [6] judgment against defendant for the sum of $4,750.00, together with interest on the sum of $4,000.00 thereof from April 22, 1924, at the rate of 6% per annum until paid, together with the costs and disbursements of this action.

G. C. & A. C. FULTON,
Attorneys for Plaintiff. [7]

EXHIBIT "A."

METROPOLITAN LIFE INSURANCE COMPANY.

Incorporated by the State of New York.
A Mutual Life Insurance Company.

ENDOWMENT 20 YEARS.

Annual Distribution of Surplus When Accrued.
Amount of Insurance—$4,000.
Payable in 20 years or at prior death.
Age—37. Annual Premium, $212.48.
Payable for 20 years or until prior death.
No. 010674 B. S.
Special Class. B.

IN CONSIDERATION

of the application for this policy, copy of which application is attached hereto and made a part hereof, and of the payment of the annual premium

of Two Hundred and Twelve Dollars and Forty-eight Cents, and of the payment of a like amount upon each 26th day of March hereafter, until twenty full years' premiums shall have been paid or until the prior death of the insured.

Promises to pay to the home office of the company in the city of New York to

ANTON STIPCICH

(herein called the Insured)

on the 26th day of March, 1944, if the insured be then living, or upon receipt at said home office of due proof of the prior death of the insured, to Josephine Stipcich, wife of the insured, beneficiary, Four Thousand Dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy, properly receipted. [8]

This Policy is written with —— the right of the Insured to the *change the* Beneficiary, when such right has been reserved, and if there be no written assignment of this Policy on file with the Company, the Insured may (while the Policy is in force) designate a new beneficiary, with or without reserving right to change thereafter, by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable endorsement. Such change shall take effect upon the endorsement of the same on the Policy by the Company and not before. If any beneficiary shall die before the Insured the interest of such beneficiary shall vest in the Insured.

The Company shall be released from all liability under this Policy if the Insured shall, within one year from the issue hereof, become engaged in or connected in any manner with the manufacture or sale of ale, wine, beer or liquor, unless so engaged at the date hereof and so stated in the application for this Policy. If the insured within one year from the issue hereof die by his own hand or act, whether sane or insane, this Policy shall become null and void and the Company will return only the Premiums which have been received thereunder.

Restrictions.

No agent is authorized to waive forfeitures or to make, modify or discharge contracts, or to extend the time for paying a premium.

Provisions and Benefits.

The Provisions and Benefits printed or written by the Company on the following pages are a part of this contract as fully as if recited over the signatures hereto affixed.

In witness whereof, the Metropolitan Life Insurance Company has caused this policy to be executed this 26th day of March, 1924.

HALEY FISKE,
President.

JAS. S. ROBERTS,
Secretary.

SHARP,
Policy Registrar.

Form 729 B. S. C. Endowment Policy.
Special Class. B. Participating. [9]

PROVISIONS AND BENEFITS.

1. PAYMENT OF PREMIUMS:—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, or *or* before date due, of a receipt signed by the President, Vice-President, Secretary or Actuary of the Company and countersigned by said agent.

A grace of thirty-one days, without interest charge, shall be granted for the payment of every premium after the first during which period the insurance shall continue in force. If death occur within the days of grace the full premium for the then current policy year, or any unpaid portion thereof, shall be deducted from the amount payable hereunder.

The payment of a premium or installment thereof shall not maintain the Policy in force beyond the date when the next premium or installment thereof is payable except as herein provided.

At any anniversary of this Policy, on written request of the Insured, approved by the Company, at its Home Office, premium payments may be changed so as to be made payable annually, or in semi-annual or quarterly installments in accordance with the published rates in force at the date of issue of this Policy.

2. AGE:—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

3. INCONTESTABILITY:—This Policy (and the application therefor) constitutes the entire contract between the parties and, except for non-payment of premiums, shall be incontestable after two years from the date of its issue.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid this Policy or be used in defense of a claim hereunder, unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued.

4. ASSIGNMENT:—No assignment of this Policy shall be binding upon the Company unless it be executed upon blanks furnished by the Company and filed with the Company at its Home Office in the city of New York. The Company assumes no responsibility as to the validity of any assignment.

5. OPTIONS ON SURRENDER OR LAPSE: Upon failure to pay any premium or any part thereof when due, this Policy, except as otherwise provided herein, shall immediately lapse. If, however, the lapse occur after three full years' premiums shall have been paid, the owner hereof, provided there be no indebtedness hereon, shall upon written request filed with the Company at its Home Office, together with the presentation of this Policy for legal surrender or for endorsement within three months from the due date of premium in default, be entitled to one of the following options:

First—A cash surrender value.

The Company in its discretion may defer the payment of the cash value for a period not exceeding ninety days after the application therefor is received by the Company.

Second—To have the insurance continued for a reduced amount of non-participating paid-up endowment insurance (including [10] any existing additions to the credit of the Policy), payable at the same time and under the same conditions as this Policy. Such paid-up insurance shall have an increasing cash surrender value equal to the full reserve at the date of surrender or a loan value up to the limit of the cash surrender value. Interest on loan under such paid-up insurance shall be payable annually in advance to the end of the policy year at the rate of six per centum per annum.

Third—To have the insurance continued for its original amount as term insurance in whole number of months from due date of premium in default, without participation and without the right to loan, and if the sum applicable to the purchase of such term insurance shall be more than sufficient to continue the insurance to the end of the endowment period named in the Policy, the excess shall be used to purchase in the same manner non-participating paid-up pure endowment (in even dollars for each one thousand dollars of insurance) payable at the end of the endowment period and on the same conditions as this Policy. The extended contract under this option may be surrendered for its full reserve at the date of surrender.

If the owner shall not, within three months from due date of premium in default, surrender this Policy to the Company at its Home Office for a cash surrender value or for endorsement for paid-up insurance or term insurance as provided in the above options, the policy shall be continued for a reduced amount of paid-up insurance as provided in the second option.

The values of these options, which are mathematical equivalents, have been calculated on the basis of the Metropolitan Special Class B. Table of Mortality, as adopted by the Insurance Department of the State of New York for computing reserves hereunder with interest at three and one-half per centum per annum (omitting fractions of a dollar per thousand of insurance) less a surrender charge of two and one-half per centum of the face of the Policy. These vales as computed produce the results set forth in the table herein at the end of the respective years.

Any indebtedness to the Company under this Policy will be deducted from the cash value; and such indebtedness will also reduce the amount of paid-up insurance or the amount continued as term insurance and any pure endowment payable at the end of the endowment term, in such proportion as the indebtedness bears to the cash value at due date of Premium in default. [11]

TABLES OF GUARANTEED LOAN VALUES AND SURRENDER OPTIONS.

Surrender Charge Having Been Deducted.

For each $1,000 of the amount of insurance

End of Year	Cash Value of Loan Value	Paid up Non-Participating Endowment Insurance	Non Participating Term Insurance Continued for Years	Months	Non Participating Paid up With Pure Endowment
3	$ 82	$130	4	7	$ 0
4	$ 112	$174	6	3	$ 0
5	$ 150	$228	8	0	$ 0
6	$ 188	$280	9	6	$ 0
7	$ 230	$334	10	10	$ 0
8	$ 272	$386	12	0	$ 2
9	$ 316	$436	11	0	$ 74
10	$ 362	$488	10	0	$146
11	$ 410	$538	9	0	$218
12	$ 460	$586	8	0	$292
13	$ 512	$636	7	0	$368
14	$ 568	$684	6	0	$444
15	$ 626	$732	5	0	$524
16	$ 686	$780	4	0	$606
17	$ 750	$828	3	0	$692
18	$ 820	$878	2	0	$782
19	$ 894	$926	1	0	$876
20	$1000	Insures			

Face amount of policy continued for period specified.
If the amount of Insurance is in excess of $1000, the Loan, Cash and Paid up Values, as shown in the table, will be proportionate.

The cash value or Loan Value at any time other than the end of the policy year (provided the full year's premium has been paid) shall be the value at the end of the current policy year, discounted at the rate of six per centum per annum.

Should surrender or default be at any other time than at the anniversary date of the Policy, the values for the preceding policy year shall be proportionately increased for the portion of the policy year for which premiums have been paid. The reserve for which funds are to be held upon this

Policy shall be computed upon the Metropolitan Special Class B. Mortality Table (as adopted by the Insurance Department of the State of New York), with interest at three and one-half per centum per annum. [12]

6. LOANS:—At any time after three full years' premiums have been paid and while this Policy is in force, the Company, on proper and lawful assignment and delivery of this Policy, will loan, on the sole security thereof, up to the limit secured by the cash surrender value as increased by the value of any paid-up additions. The loan will bear interest at the rate of six per centum per annum payable annually on the anniversary of the Policy. If interest be not paid when due, it shall be added to the principal, provided the entire outstanding indebtedness shall be within the limit secured by the cash surrender value; otherwise, non-payment of interest shall render the Policy null and void, after one month's notice shall have been mailed by the Company to the last known address of the insured and of the assignee of record, if any. The whole or any part of the indebtedness may be repaid at any time while the Policy is in force. At the option of the Company, the loan may be deferred for a period not exceeding ninety days after application therefor is received by the Company, unless such loan is to be applied solely to the payment of premiums due to the Company. After endorsement of the loan, the Policy will be returned to the borrower.

7. REINSTATEMENT.—If this Policy shall lapse in consequence of non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Company, and the payment of all overdue premiums with interest at six per centum per annum; any loan which existed at date of default, together with interest at the same rate to the date of reinstatement, to be, at the option of the owner on application for such reinstatement, either repaid in cash or continued as an indebtedness against the Policy.

PROVISIONS AND BENEFITS.

8. PARTICIPATION IN DIVISIBLE SURPLUS.—This Policy is a participating contract and the Company will annually ascertain and apportion any divisible surplus accruing hereon. The surplus as ascertained and apportioned shall, at the option of the owner, be either (a) paid in cash; or, (b) applied within the grace period toward the payment of any premium or premiums; or, (c), applied to the purchase of a participating paid-up addition to the sum insured; or, (d) left to accumulate to the credit of the Policy at such rate of interest as the Company may declare on such funds, and payable at maturity of the Policy or withdrawable in cash *or* any anniversary date of the Policy, the rate of interest to be not less than three and one-half per centum annually. If no other option is elected, the divisible surplus will be applied to the purchase of a paid-up addition

to the sum insured. Such paid-up addition may be surrendered at any time for its full reserve at the time of such surrender. The payment or apportionment of the divisible surplus shall not be conditioned upon the payment of the next premium. When in event of surrender or lapse this policy is continued as paid-up insurance or continued term insurance, it shall not share in the Divisible Surplus.

(See "Notice to Policy-holder" below.) [13]

OPTIONAL SETTLEMENTS.

9. **MODES OF SETTLEMENT:** — Having hereby reserved such right, the Insured, with right or revocation and change, by written notice to the Company at its Home Office, may elect to have the whole or any part of the net sum payable under this Policy, upon the death of the Insured, retained by the Company and paid out as provided below instead of in one sum. In case no such election has been made by the Insured, the beneficiary may so elect.

This policy is to be surrendered at maturity and a supplementary contract issued for the option elected.

These modes of settlement are, however, not applicable to a Policy which is payable to an assignee, to a corporation, to a co-partnership or association, or when the amount to be retained is less than one thousand dollars.

Subject to their general conditions and respective terms, these options are available to the owner of the Policy at its maturity as an Endowment.

OPTION 1. INTEREST PAYMENTS.—The payment of interest on the amount left with the Company at the rate which the Company may each year declare on such funds (but at no less rate than three and one-half per centum per annum), payable at the end of each year for a specified number of years or during the lifetime of the payee, and at the end of the specified period, or upon the death of the payee, by the payment of the amount retained, together with any accrued interest for the year then current, to the person designated in said notice, or, if there be no person so designated, to the executors, administrators or assigns of the payee.

OPTION 2. INSTALLMENT PAYMENTS.—The payment of equal annual or semi-annual installments covering a specified number of years, in accordance with the table below for each one thousand dollars of said net sum, the first installment being payable upon receipt of due proof of the death of the Insured. [14]

OPTION 2—INSTALMENT PAYMENTS

Number Years Specified	Amount of each of Annual Instalment	Amount of each Semi-Annual Instalment	Number Years Specified	Amount of each of Annual Instalment	Amount of each Semi-annual Instalment
1	$1,000.00	$504.34	16	$79.88	$40.38
2	508.60	256.74	17	76.38	38.60
3	344.86	173.98	18	73.26	37.02
4	261.04	132.72	19	70.48	35.62
5	214.06	107.98	20	67.98	34.38
6	181.32	91.52	21	65.74	33.24
7	158.02	79.76	22	63.70	32.22
8	140.56	70.96	23	61.86	31.28
9	127.00	64.12	24	60.16	30.44
10	116.18	58.66	25	58.62	29.66
11	107.34	54.22	26	57.20	28.94
12	99.98	50.50	27	55.90	28.28
13	93.78	47.38	28	54.68	27.68
14	88.48	44.70	29	53.56	27.12
15	83.80	42.40	30	52.54	26.60

[15]

OPTION 3. LIFE INCOME.—The payment of equal annual installments, for a fixed period of twenty years and for so many years longer as the payee shall survive, in accordance with the table below for each one thousand dollars of said net sum the first installment being payable upon receipt of due proof of the death of the Insured. [16]

OPTION 3—LIFE INCOME

Age of Payee at Death of Insured	Amount of each Instalment	Age of Payee at Death of Insured	Amount of each Instalment	Age of Payee at Death of Insured	Amount of each Instal ment	Age of Payee at Death of Insured	Amount of each Instal ment
10 and under	$43.24	25	$46.94	40	$53.24	55	$62.84
11	43.40	26	46.94	41	53.72	56	63.44
12	43.56	27	47.28	42	54.32	57	64.00
13	43.76	28	47.62	43	54.92	58	64.54
14	43.94	29	47.98	44	55.56	59	65.04
15	44.14	30	48.36	45	56.20	60	65.50
16	44.34	31	48.76	46	56.86	61	65.92
17	44.54	32	49.16	47	57.54	62	66.30
18	44.78	33	49.60	48	58.20	63	66.64
19	45.00	34	50.04	49	58.88	64	66.94
20	45.24	35	50.52	50	59.56	65	67.20
21	45.50	36	51.00	51	60.24	66	67.40
22	45.76	37	51.50	52	60.92	67 and over	67.50
23	46.04	38	52.02	53	61.58		
24	46.32	39	52.56	54	62.22		

Any installment payable under option 2 or option 3 which shall not have been paid prior to the death of the payee, unless otherwise directed in said notice, shall be commuted at three and one-half per centum compound interest and be paid in one sum to the executors, administrators or assigns of the payee.

In lieu of semi-annual installments under option 2, or annual installments under option 3, quarterly or monthly payment thereof in proportionate parts may be elected, provided that no such proportionate payments be for less than ten dollars.

Unless otherwise specified in the written notice making such election, the supplementary contract on legal release thereof may at any time be surrendered for the amount retained, with any accrued interest, under option 1, or for the commuted value of the stipulated installments yet to be paid under option 2, or for the commuted value of any of the first twenty installments then remaining unpaid under option 3; such commutation under this option (3) shall, however, in nowise affect the payments conditional upon the lifetime of the payee after the term during which the installments certain would have been payable; such commuted value under either option to be the amount as calculated by the Company on the basis of three and one-half per centum compound interest.

The sums payable under the foregoing options are based upon an assumed interest earning of three and one-half per centum, but if in any year the Company shall declare for that year, upon

funds held by it under such option, a greater interest rate than three and one-half per centum, the sum payable under option 2, or under option 3 within the fixed period of twenty years, shall be increased accordingly.

COPY OF APPLICATION ATTACHED HERETO.

NOTICE TO POLICY HOLDER.—The surplus accruing under policies of this class will probably not be sufficient to enable the Company to make a distribution of surplus under this policy before the end of the fifth year. [17]

APPLICATION TO THE
METROPOLITAN LIFE INSURANCE COMPANY
Incorporated by the State of New York. (2-22)

March 26 24.

0100574

PART A — Use Black Ink for Answers and Signatures.

Form 036K-4
Ordinary Dept.
Ed. Aug. 1921

1. Full name of person whose life is to be insured. (Print.) ANTON STIPCICH.
2. Residence. If in country, state R. F. D. Route.
   No. 562 Street. (Print.) Kensington Ave.
   City or Town—(Print.) Astoria.
   County—Clatsop. State—Oregon.
   How long have you resided at this address? 5 years.
   To what address shall premium notices be sent? Residence.
3. Place of birth. Town or City. Bakarac. State. Austria-Hungary.
4. Date of birth.
   Month—May. Day—23. Year—1887. Age nearest birthday. 37 years.
   (Be sure age and date of birth are in accord.)

Metropolitan Life Insurance Company. 23

5. Single, Married, Widower or Widow? Divorced or Separated?
Married.

6. Occupation. If more than one, state all. Nature of Employer's Business.
Contractor. Brick Mason and Concrete.

7. Exact Duties of Occupation.
Brick Mason and Supervision of Contract Work.

8. Any change in occupation contemplated? If yes, give particulars.
No.

9. Place of Business. (City, Street and No.) By whom employed?
562 Kensington. Astoria, Ore. Self.

10. Former occupation. (*With* the last ten years.)
Same.

11. Do you, with the next twelve months, contemplate journeying outside of the United States or Canada or making an ocean trip? If yes, state when, where to, for what purpose and for how long?
No.

[18]

13

Joseph Siffert vs.

12. Are you now engaged in, or subject to call for any form of Military or Naval service, or do you belong to any Military or Naval organization? If yes, give particulars.

No.

13. Have you any connection with or intention of engaging, either directly or indirectly in any form of aerial locomotion? If yes, give particulars.

No.

14. Amount of Insurance desired. $3000. Prem. Payable } Annually.

15. Plan of Insurance as designated in Rate Book.

20 Payment Life with Disability Provision and Double Indemnity Provision.

16. (a) Beneficiary in case of your death. (Print.) JOSEPHINE STIPCICH.

Relationship of Proposed Beneficiary—Wife.

Occupation—Housewife. Age—26.

P. O. Address—Same.

(b) Do you reserve the right to change the beneficiary at any time without the consent of beneficiary herein designated?

Yes.

Answer yes or no.

17. Are you now insured in this or any other Company? If yes, give particulars.

Name of Company.	Amount.	Kind of Policy.	Year Issued.	If in Metropolitan give Policy Nos.
Knights of Columbus.	$1000	W. L.		

18. Is the policy for which you are now applying to this Company intended to take the place of insurance carried with this or any other Company? If yes, give particulars.

No.

19. Is any application or negotiation for other insurance on your life now pending or contemplated? If yes, give particulars.

No.

20. Corrections and Amendments. (For Home Office use only.)

Policy issued in Special Class B.

Plan changed to 20 Year Endowment.

Sum insured—$4,000.

Policy issued without Disability Annuity.

Provision.

Policy issued without double indemnity.

[19]

59

Joseph Stipech vs.

21. Have you ever applied to any Company or Association without receiving Insurance in the amount or on the plan applied for, or at your actual age, or at the normal premium therefor? If yes, give particulars.

Company or Association.	Year.	If not as applied for, in what respect different?	Declined or postponed.	If not advised, so state.

No.

To be completed in the case of a woman applicant, if ever married.

22. What are (in full) the sources of your income?
23. Is anyone entirely dependent on you for support? If yes, give particulars.
24. Number of children living, age and occupation of each.
25. Husband's *nmae*. (Print.)

    Age ———. Business ———.
26. In what Companies and for what amount is he insured in your favor?

    If in Metropolitan, give policy numbers. If not insured in your favor, state why not.

    Is application on his life being submitted?

IT IS UNDERSTOOD AND AGREED:

1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company, (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting *any benefits* any benefits under any policy issued hereunder.

3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application. [20]

4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant.

5. In case of apparent errors or omissions discovered by the Company in the foregoing application or in case the Company shall be unwilling to issue a policy upon the plan or in the amount applied for, the Company is hereby authorized to amend this application by noting the change in the space entitled "Corrections and Amendments" and to prepare and submit a policy on a different plan or in a different amount from that hereby applied for, and I hereby agree that my acceptance of such policy, as so submitted, accompanied by a copy of the application so amended, shall operate as a ratification of such changes or amendments.

Signed by Applicant and dated at Astoria, Oregon, this 17 day of February, 1924.

Witness to Signature:
HOFFMAN.

Signature of applicant:
ANTON STIPCICH.

[21] CONTINUATION OF THE APPLICATION.

APPLICANT'S STATEMENTS TO THE MEDICAL EXAMINER.

PART B — Use Black Ink for Answers and Signatures.

The spaces below are for the applicant's answers only. Nothing but his answers should be inserted.

Statements of or comments by Medical Examiner must be recorded in Part C.

	(Insert answers below)
1. What is your occupation? (exact duties)	Contractor—Brick—Concrete Construction.
2. Have you ever undergone a medical examination for insurance and failed to receive the exact amount or kind of policy applied for? If yes, give particulars and name of Company.	No.
3. Have you during the past year resided or been intimately associated with any person suffering from tuberculosis? If so, give particulars and precautions taken.	No.
4. Has any of your parents, grandparents, brothers or sisters now, or ever had tuberculosis, cancer, diabetes, epilepsy, insanity or other hereditary disease? If yes, give particulars.	No.
5. Have you ever been an inmate of, or have you ever received treatment at an asylum, hospital, sanitorium or cure? If yes, when, how long and for what?	Yes. St. Mary's Hospital, Astoria, Ore., Jan., 1922. Thirteen days—Perforating ulcer deodenum with gastro enterostomy.

6. Have you ever changed residence or traveled for your health? If yes, why and when.

No.

7. Have you ever received or applied for a pension or disability or compensation benefits from any government or from any municipal or private corporation or have you ever received or applied for any benefit under a policy of accident or health, workmen's compensation or fraternal insurance? If yes, state reason in full.

No.

8. Have you ever used opium, chloral, cocaine or other narcotic?

No.

9. (a) To what extent do you use beer, wine or other alcoholic beverages?

(a) Wine sometimes with meals.

(b) Have you ever used any of them to excess? If so, when and for how long?

(b) No.

10 Have you ever suffered from any ailment or disease of	"Yes" or "No"	Name of Each Ailment, Disease or Injury	No. of Attacks	Date	Duration	Severity	Results, and if within five years, name and address of every physician consulted.
(a) The Brain or Nervous System?	No						
(b) The Heart or Lungs?	No						Recovery Drs. A. A. Finch— Toivo Forrstrom Astoria, Ore.
(c) The Stomach or Intestines, Liver, Kidneys or Genito Urinary Organs?	Yes	Perforating ulcer duodenum	1 1922	Jan.	days 13	Operation	

(d) The Skin, Bones, Glands, Ears or Eyes? No.

11. (a) Have you ever had Rheumatism, Gout or Syphilis? No

(b) Have you ever had Paralysis or Insanity? No

(c) Have you ever had Diabetes, Pleurisy or Pneumonia? No

(d) Have you ever raised or spat blood? If so, give full details. No

(e) Have you ever had any Accident, Injury or Occupational Disease?	No					
(f) Have you ever had any Surgical Operation?	Yes	Gastro Enterostomy	1	Jan. 1922	13 days in hospital	Dr. T. Forrstrom, Astoria, Oregon
(g) Have you consulted a physician for any ailment or disease not included in your above answers?	No					

[23]

12. What physician or physicians, if any, not named above, have you consulted or been treated by, within the last five years and for what illness or ailment? If none, so state.	Name and Address of Physician	Date and Details of Illnesses	Results
	None		

13. Living Family Record

Age		Condition of Health of Each. (If not good, give details)		Age	(Dead) Cause of Death	How Long Sick	Year of Death	Ages Attained by Grandparents. (Living or Dead)
73		Good	Father					Father's Father:
76		Good	Mother					Dead. 88
30	44		Brothers					Father's Mother:
35	47	All Good	No. Living 6	21 yr.	Typhoid Fever	3 Days	1904	Dead. 80

39	51		No. Dead 2	6 mo. 10 day	Infant Infant	Mother's Father: Dead. 80
			Sisters			
40		Good	No. Living 2			Mother's Mother:
50		Good	No. Dead 1	53	Died in Austria Cause not Known 1919	Dead. 70

I HEREBY CERTIFY that I have read the answers to the questions in Part A hereof and to the questions in Part B hereof, before signing, and that they have been correctly written, as given by me, and that they are full, true and complete, and that there are no exceptions to any such answers other as stated herein.

Dated at Astoria, Ore., this 18 day of Feb., 1924.

Witness to Signature:

ELDRED B. WAFFLE, M. D.,

[24] Astoria, Ore.

NOTICE TO POLICY HOLDER.

Please Read Your Policy Promptly upon Its Receipt.

Do not fail to notify the Company at its Home Office when you change your address.

When writing District Office

or the Home Office give your Policy Number and state clearly Name, Residence, County and State.

Checks, Drafts or Money Orders

in payment of premiums should be drawn to the order of Metropolitan Life Insurance Company.

Privilege of voting for Directors.

The election of Directors of the Company is to be held in New York on the second Tuesday in April, 1923, and every second year thereafter.

The holder of this Policy while it remains in force, after one year from its date, will have a right to vote, either in person or by proxy or by mail. For particulars how to vote, apply to the Secretary, No. 1, Madison Avenue, New York City.

In the event of the death of the Insured,

the Claimant should promptly advise the Home Office, in New York, or the District Office through which premium payments have been made.

Pay nothing to any representative of the Company for preparation of claim papers. Deliver the Policy only to the Company's representative. The Company is glad to pay and there is no necessity for help or alleged influence in collecting.

It is not necessary to employ an attorney or any

other person to collect the insurance under this Policy, or to secure any of the benefits it provides. [25]

This policy shall not take effect unless or until the full premium has actually been paid in cash.

Payments are invalid unless made in exchange for an official Home Office receipt signed by the President, Vice-President, Secretary or Actuary of the Company and properly countersigned by an Agent of the Company.

METROPOLITAN LIFE INSURANCE COMPANY

ACKNOWLEDGES THE RECEIPT of $212.48, the first—annual premium under this Policy.

Countersigned March 19, 1924.

JAS. S. ROBERTS,
Secretary.

J. F. SCANLAN, Mgr.
(Signature)

Per JULIEN COBLENTZ.

The Company's agents have no authority to waive forfeitures, alter or amend the Contract, to accept premiums in arrears or to extend due date of such premiums. [26]

(Endorsed on Bank of Policy.)

District WILLAMETTE.

Number 0100574 S.

METROPOLITAN

LIFE INSURANCE COMPANY.

1 Madison Avenue,

NEW YORK.

Annual Distribution of Surplus When Accrued

Special Class B.

ENDOWMENT

20 YEARS

Insurance on the Life of ANTON STIPCICH.

Amount $4000

Annual Premium $212.48

Payable for 20 years or until prior death.

729 B. S. C.—2—20 [27]

State of Oregon,

County of Clatsop,—ss.

I, Josephine Stipcich, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action, and that the foregoing complaint is true, as I verily believe.

JOSEPHINE STIPCICH.

Subscribed and sworn to before me this 19th day of January, A. D. 1925.

[Notarial Seal.]

G. C. FULTON,
Notary Public for Oregon.

My commission expires Dec. 15, 1927.

[Endorsed]: No. 11510. In the Circuit Court of the State of Oregon for Clatsop County. Josephine Stipcich, Plaintiff, vs. Metropolitan Life Insurance Company (a Corporation), Defendant. Complaint. Jan. 19, 1925. J. C. Clinton, Clerk. By Max W. Pohl, Deputy. G. C. & A. C. Fulton, Attorneys for Plaintiff, Astoria, Oregon. [28]

BE IT REMEMBERED, That at a regular term of the Circuit Court, of the State of Oregon, for the County of Clatsop, begun and held at the County Courthouse in Astoria, in said County and State, on Monday, the 16th day of February, A. D. 1925, the same being the third Monday in said month, and the time fixed by law for holding a regular term of said court. Present: Hon. J. A. EAKIN, Judge, Presiding.

WHEREUPON, a term of said Court is begun and holden on Tuesday, the 24th day of February, A. D. 1925, the same being the 7th judicial day of said term of said court, and among other proceedings, the following was had, to wit:

Case No. 11510.

JOSEPHINE STIPCICH,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant.

ORDER FOR REMOVAL OF CAUSE.

Now at this time on motion of the defendant, it appearing to the Court that defendant has heretofore, and within the time prescribed by law, filed its petition and bond for the removal of this cause to the District Court of the United States for the District of Oregon, and said petition and bond being found sufficient in form and substance,—

IT IS NOW THEREFORE HERE ORDERED that this cause be and is hereby removed to the said District Court of the United States for the District of Oregon, and that the Clerk prepare a transcript of all records and files in the cause, and deliver the same to the defendant, or its attorney, on payment of the amount of his charges for the same.

J. A. EAKIN,

Judge.

Transcript of Record on Removal. Filed March 2, 1925. G. H. Marsh, Clerk. [29]

AND AFTERWARDS, to wit, on the 31st day of March, 1925, there was duly filed in said court, an answer, in words and figures as follows, to wit: [30]

[Title of Court and Cause.]

ANSWER.

Defendant herein for answer to the complaint in the above-entitled cause admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of the complaint.

II.

Answering paragraph II of the complaint defendant denies the same and every allegation thereof except as hereinafter expressly alleged and admitted.

III

Answering paragraph III, defendant admits that Anton Stipcich died on the 8th day of April, 1924, and denies every other allegation in said paragraph contained except as hereinafter expressly alleged and admitted.

IV.

Defendant admits the allegations of paragraph IV.

V.

Answering the allegations of paragraph V defendant denies same except as hereinafter expressly alleged and admitted.

VI.

Answering the allegations of paragraph VI defendant admits that plaintiff has frequently demanded payment of the sum of $4000.00, and that defendant has refused to pay the same, and no part thereof has been paid, and that defendant denies liability and obligation under the policy alleged in the complaint, and denies all other allegations in said paragraph.

VII.

Answering paragraph VII defendant admits that more than eight months have expired between the 22d day of April, 1924, and the filing of the complaint herein, and denies every other [31] allegation in said paragraph except as hereinafter expressly alleged and admitted.

VIII.

This defendant denies the allegations of paragraph VIII and every part thereof.

And for further and separate answer and defense, defendant alleges:

I.

That on or about the 17th day of February, 1924, Anton Stipcich signed and delivered to the agent of this Company at Astoria, Oregon, application for insurance, a substantially correct copy of which is set out in the complaint. Thereafter and on the 29th day of March, 1924, defendant, in reliance upon the statements contained in said application, and upon statements made by Anton Stipcich to the medical examiner of defendant at and after the date on which said application was signed, and

in reliance upon the correctness of said statements at the time of making thereof and thereafter and up to the delivery of the policy, as a true and correct representation of the state of health of said Anton Stipcich, and upon his obligation to disclose any material change in his condition up to the time of the delivery of the policy, and not otherwise, prepared and delivered a policy upon the life of said Anton Stipcich to a person acting for him, a substantially correct copy of which policy is set out in the complaint.

II.

That material statements of fact made in the said application and in the statements to the medical examiner by defendant, to wit: statements respecting the recovery of the said Anton Stipcich from a serious sickness previously suffered, and in respect to recurrence of the same and in respect to consultation of physicians and receiving treatment and examination for the same, were false and untrue, and were known by said Anton Stipcich and by the [32] plaintiff to be false and untrue at the time of their making, and the said Anton Stipcich and the plaintiff concealed from the defendant material and essential facts which it was the duty of the said Anton Stipcich and the plaintiff to disclose to the defendant, to wit: that said Anton Stipcich had suffered a serious recurrence of the illness from which he had previously suffered and was confined in a hospital on account of said illness, and at the time of the delivery of the policy the said Anton Stipcich and the plain-

tiff had arranged that he should return and he did soon thereafter return to a hospital for a serious and dangerous surgical operation upon himself in treatment of the said disease, in consequence of which disease and following the operation therefor said Anton Stipcich died on April 8th, 1924.

III.

That if said material and essential facts known to plaintiff and to said Anton Stipcich had been disclosed to defendant, or if the truth in respect to the same had been disclosed in whole or in any material part to defendant by plaintiff or by said Anton Stipcich, defendant would not have issued said policy of insurance.

IV.

That defendant had no knowledge or means of knowledge of said essential and material facts or of the falsity of the representations relating to the same or of the concealment thereof until after the death of said Anton Stipcich. The said false statements of fact and the concealment thereof were deliberately and wilfully and purposely made and committed by the said Anton Stipcich and by this plaintiff in order to obtain from defendant the policy upon which this action is brought.

V.

That after the death of said Anton Stipcich and on or about April 22d, 1924, plaintiff delivered to this defendant upon forms furnished by it, documents alleged to be proofs of death which were false in material particulars relating to the illness of said Anton Stipcich, and his consultation with

and employment of [33] physicians therefor prior to the delivery of the policy.

VI.

That defendant immediately upon learning the facts in this separate answer and defense set forth tendered to plaintiff the sum of $212.48, being the full amount on the first and only premium paid on behalf of Anton Stipcich upon the policy set forth in the complaint, and herewith brings and tenders the same into court for the benefit of plaintiff.

WHEREFORE, defendant having fully answered plaintiff's complaint prays to be hence dismissed, and for its costs and disbursements herein most wrongfully sustained.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, Raymond R. Barnhardt, make oath and say that I am agent and attorney in fact of the defendant in the above-entitled court and cause, and that the foregoing complaint is true as I verily believe.

R. BARNHART.

Subscribed and sworn to before me this 31st day of March, 1925.

[Seal]

RICHARD W. MONTAGUE,
Notary Public for Oregon.

My commission expires Jany. 14, 1929. [34]

United States,
District of Oregon,—ss.

I, Richard W. Montague, upon oath say that I served the within answer upon Messrs. G. C. and A. C. Fulton of Astoria, Oregon, on the 31st day of March, 1925, by depositing a copy thereof with the Clerk of this Court; said G. C. and A. C. Fulton not being residents of the city of Portland nor having an office therein, and not having designated by endorsement on the complaint or elsewhere a designation of the place in Portland where notices and copies might be served on them.

RICHARD W. MONTAGUE.

Subscribed and sworn to before me this 31st day of March, 1925.

[Seal] M. M. HARGROVE,
Notary Public for Oregon.

My commission expires Feb. 7, 1927.

Filed March 31, 1925. [35]

AND AFTERWARDS, to wit, on the 7th day of May, 1925, there was duly filed in said court, a reply, in words and figures as follows, to wit: [36]

[Title of Court and Cause.]

REPLY.

The plaintiff by this, her reply to the further and separate answer and defense set forth in de-

fendant's answer, admits, alleges and denies as follows, that is to say:

I.

Plaintiff replying unto paragraph numbered I of such answer admits that on or about the 17th day of February, 1924, Anton Stipcich signed and delivered to the agent of defendant company, at Astoria, Oregon, an application for insurance, a copy of which is set forth in the complaint, and it is also admitted that thereafter, and on March 29, 1924, the defendant executed and delivered to plaintiff the policy of insurance set forth in plaintiff's complaint, but as to all other matters and things set forth in said paragraph, this plaintiff denies.

II.

Replying unto paragraphs numbered II, III and IV of said answer, the plaintiff denies the same, and the whole thereof, and each and every allegation therein contained.

III.

Replying unto paragraph numbered V of said answer, it is admitted that after the death of said Anton Stipcich, and on or about April 22, 1924, plaintiff delivered to defendant upon forms furnished by it proof of the death of said Anton Stipcich, all in accordance with the terms of said contract, and not otherwise but as to all other matters and things set forth in said paragraph, this plaintiff denies.

IV.

Replying unto paragraph numbered VI of such

answer, this [37] plaintiff denies the same, and the whole thereof, and each and every allegation therein contained, excepting it is admitted that prior to this action, the defendant tendered to plaintiff the sum of $212.48, the premium theretofore paid by the insured for said policy of insurance, but as to whether or not defendant has paid said sum to this court, plaintiff has no knowledge or information thereof sufficient to form a belief.

WHEREFORE, plaintiff having fully replied to the matters set forth in said answer, prays judgment accordingly as demanded in her complaint.

G. C. & A. C. Fulton,
Attorneys for Plaintiff.

State of Oregon,
County of Clatsop,—ss.

I, Josephine Stipcich, being first duly sworn, deposes and say that I am the plaintiff in the above-entitled action, and that the foregoing reply is true, as I verily believe

JOSEPHINE STIPCISH.

Subscribed and sworn to before me this 6th day of May, A. D. 1925.

[Seal] G. C. FULTON,
Notary Public for Oregon.

My commission expires Dec. 15, 1927.

Copy mailed to defts. attorney, May 6th, 1925.

G. C. FULTON,
Attorney for Plff.

Filed May 7, 1925. [38]

AND AFTERWARDS, to wit, on Tuesday, the 28th day of July, 1925, the same being the 20th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [39]

In the District Court of the United States for the District of Oregon.

No. L.—9570.

JOSEPHINE STIPCICH,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

MINUTES OF COURT—JULY 28, 1925—JUDGMENT.

Now at this day come the parties hereto, by their counsel as of yesterday, and, the jurors impaneled herein being present and answering to their names, the further trial of this cause is resumed. Whereupon the plaintiff and the defendant having both rested their cases, the defendant moves the Court for a directed verdict in its favor; and the Court having heard the argument of counsel and being fully advised in the premises,—

IT IS ORDERED that the said motion be and the same is hereby allowed. Whereupon the jury,

at the direction of the Court, returns its verdict, in words and figures as follows, to wit:

"We, the jury in the above-entitled cause find for the defendant by direction of Court."

LEON HIRSCH,
Foreman.

Portland, Oregon, July 28 1925."

—which said verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that the said plaintiff take nothing by this action, that the said defendant go hence without day, and that said defendant have and recover of and from said plaintiff its costs and disbursements herein, taxed at $123.05. Whereupon on motion of the plaintiff,

IT IS ORDERED that she be and is hereby allowed to September 10, 1925, within which time to file her motion for a new trial herein. [40]

AND AFTERWARDS, to wit, on the 29th day of August, 1925, there was duly filed in said court a motion to set aside the verdict and for a new trial, in words and figures as follows, to wit: [41]

[Title of Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR NEW TRIAL.

Comes now the above-named plaintiff by her attorneys, G. C. & A. C. Fulton, and moves the Court to set aside the verdict and judgment hereto-

fore rendered and entered in this cause, and to grant plaintiff a new trial, and for grounds of motion, alleges:

I.

The Court erred in the exclusion of, and in not allowing competent, relevant, material and proper evidence offered on behalf of the plaintiff, duly excepted at the time, and the exceptions allowed by the Court.

II.

The Court committed error in admitting incompetent, irrelevant, immaterial and improper evidence produced on behalf of the defendant, over the objections and exceptions of plaintiff duly made at the time and duly allowed by the Court.

III.

The Court erred in instructing the jury to bring in a verdict in favor of the defendant, to which action of the Court, the plaintiff then and there duly excepted, and the exception was allowed by the Court.

This motion is based on the record and files in said cause and the testimony and evidence produced at trial thereof.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

State of Oregon,
County of Clatsop.—ss.

Due service of the within motion is hereby accepted in said county and state, this 28th day of August, 1925.

WOOD, MONTAGUE & MATTHIESSEN.

Filed August 29, 1925. [42]

AND AFTERWARDS, to wit, on Monday, the 26th day of October, 1925, the same being the 97th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [43]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 26, 1925—ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard by the Court upon the motion of the plaintiff to set aside the verdict herein and for a new trial, plaintiff appearing by Mr. G. C. Fulton, of counsel, and the defendant by Mr. Richard W. Montague, of counsel. And the Court now being fully advised in the premises,

IT IS ORDERED that said motion be and it is hereby denied. [44]

AND AFTERWARDS, to wit, on the 26th day of October, 1925, there was duly filed in said court an opinion of the Court, in words and figures as follows, to wit: [45]

[Title of Court and Cause.]

OPINION.

Motion for New Trial.

Messrs. G. C. and A. C. FULTON, Astoria, Oregon, Attorneys for Plaintiff.

Messrs. RICHARD W. MONTAGUE and ERSKINE WOOD, Portland, Oregon, Attorneys for Defendant.

Portland, Oregon, October 26, 1925.

BEAN, District Judge:

This is an action on a policy of insurance on the life of Anton Stipcich, loss if any payable to his wife. The policy was issued March 26, 1924. The application therefor was made on the 17th day of February of the same year. In it the applicant stated that he had been operated on for "Perforating ulcer, duodenum," in January, 1922, but had recovered. To all other questions as to whether he had had certain diseases his answer was no.

Between the date of his application and the issuance of the policy, there was either a return of his old trouble or a manifestation of a new ulcer. On the day he applied for insurance, but before making the application, he consulted a physician (Dr. Forrstron, who previously had operated on him) for some trouble of the stomach, and was given a prescription, although this was not disclosed in the application. A few days later, and after the application, he again called upon the same physician in

regard to the matter, who suggested that an X-ray be taken. On the 7th or 8th of March, he consulted Dr. Sommers, of Portland, and was sent to the hospital for observation, where he remained five or six days, and during that time Dr. Sommers made a careful examination and diagnosis of his condition and told him that in his opinion he had a duodenal ulcer and advised surgical interference. About the 20th of the month he consulted and was examined by Dr. Stater, with the same result and advice. Soon after the delivery of the policy he went to the hospital, was operated on and died the 8th day of April.

On the trial the plaintiff offered to testify that after her husband had been examined by Dr. Sommers and before the [46] issuance of the policy she talked with Mr. Julian Coblentz, the agent of the defendant, who took the application, about the matter and told him that Dr. Sommers had recommended an operation, possibly for an ulcer, and that Coblentz suggested that her husband be examined by another physician.

Objection was sustained to the offer of proof and verdict directed in favor of the defendant.

The motion for a new trial raises substantially two questions: First, whether it was incumbent on the defendant company to show affirmatively that at the time it issued and delivered the policy, it did not know of the change in the condition of the health of the applicant, or was the burden on the plaintiff to show that it had such knowledge. And, second, did the Court err in ruling that the

proposed testimony of the plaintiff as to her conversation with Coblentz was inadmissible.

The application for insurance provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The representations and statements made by the *application* in his application as to the condition of his health, therefore, continued up to and were in effect at the time the policy was issued and delivered, and formed a part of the contract. The contract of insurance becomes effective from that time, and not before. Any material change in the health of the applicant between the date of the application and the issuance of the policy would void the policy unless known to the company. That there was such a change requires no argument. It is scarcely conceivable that a responsible insurance company would knowingly insure the life of one who was at the time suffering from acute intestinal trouble diagnosed by two competent physicians as a duodenal ulcer, and who had advised surgical interference. In any event, fair dealing would suggest that it be informed of such facts and thus be given an opportunity to determine whether it would nevertheless issue the policy. There is a presumption that the [47] assured's representations and answers to the questions in his application were true at the time they were made and would so continue down to the issuance of the policy. (14 Ruling Case Law, p. 1343; 33 Cor. Jur. 104.) But there is no presumption that he advised the com-

pany of the falsity of such statements or of the change in his health after the application, or that the continuing representations were not true. Indeed, if there is any presumption at all, it would seem to be to the contrary, for as a reasonable man, the applicant must have known that it was at least very doubtful whether the policy would issue if the company knew the actual condition of his health.

The burden of proof was on the company to show that there was a material change in the health of the applicant between the date of the application and the issuance of the policy and this burden is assumed. It was, however, the duty of the *application* to disclose to the company any such change, and in my judgment it was incumbent upon the plaintiff, after the showing made by the defendant, to prove that such duty had been performed before it is to be held that the company consented to insure the life of the applicant in the condition of his health at the time the policy was issued. May on Insurance, Sec. 190; 25 CYC. 797; Sun Mutual Ins. Co. vs. Ocean Ins. Co., 107 U. S. 485; Equitable Life Ins. Soc. vs. McElroy, 83 Fed. 631; Cable vs. U. S. Life Ins. Co., 111 Fed. 19; Society Life Ins. Co. vs. Boone, 159 Pac. 1080. To adopt the language of Judge Sanborn in Equitable Life vs. McElroy, *supra*:

> "The nature of the contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject matter, his own life, the ignorance of the in-

surance company, concerning it, and the necessary reliance in making the contract upon his good faith, honesty and truthfulness impose upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally consummated. An intentional omission to discharge that duty perpetrates a plain fraud upon the company which necessarily avoids the contract."

If the company had been advised of the change in the applicant's health and thereafter issued the policy, it could not be heard to say that the policy was void on that account, but it was entitled to be fully informed on that subject, so that it might [48] determine whether it would complete the contract. It had a right to rely on the truth of the statements made in the application in the absence of other information and act accordingly, and if it had been advised of the change in the applicant's health, it seems to me that it was incumbent upon the plaintiff to show that fact, and not on defendant to prove a negative.

It is claimed by the plaintiff that notice to Coblentz of a change in the applicant's health after the application had been signed and forwarded to the company is to be imputed to the company. This would not follow unless Coblentz had either actual or ostensible authority to act for the company in the matter. Unless he had, mere knowledge on his part, uncommunicated to his principal, would not be binding upon it. Knowledge to an

agent is only knowledge to his principal in matters which are within the scope of his authority. Section 6435 Oregon Laws, which provides that one who solicits and procures an application for life insurance shall be regarded as an agent of the company, does not fix the scope of such agent's authority, and does not raise a special agent with limited authority to a general agent. (Mutual Life Ins. Co. vs. Hatch, 241 U. S. 613.) Coblentz was a soliciting agent with power to solicit insurance, take applications and collect premiums when due, but without authority to accept risks or issue policies, make contracts of insurance, or modify or waive any of the conditions of the contract. It so appears from the application and policy. It is declared in the application that the statements and answers in the application, together with the report of the medical examiner, shall form the basis of the contract of insurance if one is issued, and that no agent or any other person except the officers of the company have power, on behalf of the company, to make, modify or discharge any contract of insurance, or bind the company by making any promises respecting any benefits under any policy, and that any knowledge on the part of any agent as to any facts pertaining to the applicant shall not be considered as having been made or brought to the knowledge of the company unless stated in the application. [49]

The policy as delivered and accepted contains the provision that no agent is authorized to waive forfeiture or make, modify or discharge the con-

tract. These restrictions and limitations on the power and authority of the agent are such as the company had a right to make, and of which the assured had knowledge, and by which he and his beneficiaries are bound. (Iverson vs. Metropolitan Life, 91 Pac. 669; Nor. Assurance vs. Grand View Bldg. Assn., 183 U. S. 308; Madsen vs. Maryland Casualty Co., 142 Pac. 51.)

It follows, therefore, that the motion for a new trial should be overruled, and it is so ordered.

Filed October 26, 1925. [50]

AND AFTERWARDS, to wit, on Tuesday, the 27th day of October, 1925, the same being the 98th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [51]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 27, 1925—ORDER EXTENDING TIME TO PREPARE, SERVE AND TENDER BILL OF EXCEPTIONS.

Now at this day, upon motion of Mr. G. C. Fulton, of counsel for plaintiff,—

IT IS ORDERED that the plaintiff be and she is hereby allowed thirty days from this date within

which time to prepare, serve and tender her bill of exceptions herein. [52]

AND AFTERWARDS, to wit, on Friday, the 27th day of November, 1925, the same being the 22d judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [53]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 27, 1925—ORDER EXTENDING TIME TO FILE OBJECTIONS TO BILL OF EXCEPTIONS.

Now at this day, upon motion of Mr. Richard W. Montague, of counsel for the said defendant,—

IT IS ORDERED that the defendant be and it is hereby allowed thirty days from this date within which to file its objections to the plaintiff's proposed bill of exceptions. [54]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [55]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Honorable ROBERT S. BEAN, Judge of the District Court Aforesaid, and Before Whom the Above-entitled Cause was Tried and Determined:

Comes now Josephine Stipcich, by her attorneys, G. C. & A. C. Fulton, and respectfully shows that on the 28th day of July, A. D. 1925, the Court directed a verdict in the above-entitled action against your petitioner and in favor of the above-named defendant Metropolitan Life Insurance Company, and upon said verdict, a judgment was entered on the 28th day of July, A. D. 1925, against your petitioner and in favor of the above-named defendant.

Your petitioner feeling herself aggrieved by the said verdict and judgment entered thereon as aforesaid herewith petitions the Court for an order allowing her to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of

security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

G. C. & A. C. FULTON,
Attorneys for Petitioner in Error.

Writ of error granted this 9th day of December, A. D. 1925, and also the amount of bond or security to be given by the [56] plaintiff in error may be as follows:

Supersedeas bond fixed at $500.00.

R. S. BEAN,
District Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition for writ of error is hereby accepted in said County and State, this 9th day of December, A. D. 1925.

RICHARD W. MONTAGUE,
Of Attorneys for Defendant.

Filed December 9, 1925. [57]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [58]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

The plaintiff in error in this action in connection with her petition for a writ of error makes the following assignments of error, which she avers occurred at the trial of said cause and upon which she relies to reverse the judgment entered herein, to wit:

(1) The Court erred in sustaining and in not overruling the objection of counsel for defendant to and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

> Q. Now, after you got that, after Dr. Sommer had told you that your husband may, or he may not have an ulcer, did you have any talk with Mr. Coblentz, of the insurance company? If so, state what it was.

(2) The Court erred in denying and rejecting the following offer of proof, being an offer of proof made in response to the question set forth in Assignment of Error No. 1 hereof, and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf to produce the following testimony, to wit:

> That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: That after her husband,

Anton Stipcich, had been examined and X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the doctor had recommended an operation, possibly for an ulcer; that the doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time, Mr. Julien Coblentz was agent for the defendant company. [59]

(3) The Court erred in sustaining and in not overruling the objection of counsel for the defendant to, and in not permitting plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

Q. Who suggested that you should go to see Dr. Coffey?

(4) The Court erred in denying and rejecting the following offer of proof and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to testify to the following facts, being the offer of proof in response to the question set forth in Assignment of Error No. 3 above, namely

If the witness were permitted to answer that question, she would state that her husband went to Dr. Coffey at the suggestion of Mr. Coblentz.

(5) The Court erred in granting and in not overruling the motion of defendant for an order directing the jury to return a verdict in favor of the defendant.

(6) The Court erred in taking from the jury the right to pass upon the issues of fact in this case.

(7) The Court erred in instructing the jury to bring in a verdict in favor of the defendant and against the plaintiff.

(8) The Court erred in entering a judgment in favor of the defendant and against plaintiff.

(9) The Court erred in adjudging and declaring the following to be the law of the case, namely:

> It seems to me, that in view of this application and policy and the fact that it appears on the face of the application that that was the intention, that statements made to or by an agent should not be binding on the company unless contained in the application, that mere knowledge by a soliciting agent who had no authority to deliver the policy or issue it, and whole duty it was simply to take the application and forward it to the Home Office, the Manager, or somebody that had authority to issue it, that notice to such [60] an agent did not bring that notice to the company. I may be in error, but that is my view of the law at this time, therefore I sustain this objection.

(10) The Court erred in declaring and adjudging the following to be the law of this case, namely:

> This policy, or this application provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The policy was issued on the 26th of March. The date of delivery has not been shown by the testimony,

but assuming that it was delivered on that day —but there is no proof on that subject—I understand the law to be, and so stated on the demurrer, that if this application and policy were to take effect from the date of its issue, the obligation of the applicant to make full disclosure of his physical condition continues to the completion of the contract, that would be down to the issuance of the policy, and any material change in the condition of his health before the consummation of the contract, before the issuance of the policy in this case, should have been reported to the company.

Now the evidence shows, and I don't see that there is any room for controversy about it, that soon after this application was made the applicant appeared here in Portland and consulted Dr. Sommer about his physical condition, and after an examination, and being under observation for five or six days, the doctor advised that he probably had an ulcer, or concluded that he probably had an ulcer, and so advised the applicant, and advised him to submit to an operation. Now he wasn't satisfied with that, so he went to another physician along about the 20th of March, and obtained the same information, and that certainly was enough to advise him of the change in the condition of his health, and it was information that I think he was obliged and in duty bound to communicate to the insurance company, because if he had [61] communicated it to the company that

after the application he had consulted a physician and been advised he was afflicted with an ulcer, and to submit to an operation, it would be up to the company to determine whether or not it would issue the policy, but it was his duty to communicate that fact to the company, and not having done so, or if he didn't do so, it would seem to me that would void the policy.

Now on the question of whether he did or not, there is no direct evidence, but there is evidence by the manager at Astoria, that no such communication was made to him, or through his office to the company, and in addition to that the company issued and delivered the policy, based upon the original application, and upon the original application, and attached to the policy were particular declarations that it was acting upon that application alone. So that I think it would be futile for the Court to hold that there was any proof on this contention that this condition of the applicant had been in fact communicated to the company. So if I am right in my interpretation of the law covering contracts of insurance of this kind, it seems to me there is no escape from the conclusion that the motion for a directed verdict in favor of the company should be allowed. An insurance company has a right under the law to be advised of the condition of the health of its applicants at the time it makes the contract, and that was not done in this case. Whatever the purpose of this gentleman may

have been in these inquiries at the time and under the circumstances, and not communicating to the company his condition, but waited until after the policy had been issued before he went to the hospital for the operation, is wholly beside the question involved in this case. So I take it that under the record as it appears, the Court has no alternative but to allow this motion.

WHEREFORE, plaintiff in error prays that the judgment [62] of said Court be reversed.

G. C. & A. C. FULTON,
Attorneys for Plaintiff in Error.

State of Oregon,
County of Clatsop,—ss.

Due service of the within assignments of error is hereby accepted in said County and State, this 9th day of December, A. D. 1925.

RICHARD W. MONTAGUE,
Attorneys for Defendant in Error.

Filed December 9, 1925. [63]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [64]

No. L.-9570.

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Josephine Stipcich, plaintiff, and Vince Bakotich and Frank Patton, as sureties, are held and firmly bound unto the defendant Metropolitan Life Insurance Company, in the full sum of $500.00 to be paid to it, its attorneys, successors and assigns, to which payment well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Signed and dated this 9th day of December, A. D. 1925.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Oregon, in an action pending in said court between Josephine Stipcich, as plaintiff, and the Metropolitan Life Insurance Company, a corporation, as defendant, cause No. L.-9570, on the law docket of said court final judgment was rendered against the said plaintiff Josephine Stipcich for the sum of $500.00 costs and disbursements of such action, and the said plaintiff Josephine Stipcich has obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment of said court in the aforesaid action, and a citation duly directed to the Metropolitan Life Insurance

Company, defendant in error, citing it to be and appear before the United States Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Josephine Stipcich shall prosecute her writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and effect. [65]

IN WITNESS WHEREOF, we have hereunto set out hands and seals, this 9th day of December, A. D. 1925.

JOSEPHINE STIPCICH. (Seal)
By G. C. FULTON,
Her Attorney.
FRANK PATTON. (Seal)
V. F. BAKOTICH. (Seal)

United States of America,
District of Oregon,
County of Clatsop,—ss.

We, Vince Bakotich and Frank Patton, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and freeholder within the State of Oregon, and am not a counsellor ar attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of One Thou-

sand Dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

FRANK PATTON.
V. F. BAKOTICH.

Subscribed and sworn to before me this 9th day of December, A. D. 1925.

[Seal] G. C. FULTON,
Notary Public for Oregon.

My commission expires—

Approved this 9th day of Dec., A. D. 1925.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within undertaking on appeal is hereby accepted in said county and State, this 9th day of December, A. D. 1925.

RICHARD W. MONTAGUE,
Of Attorneys for Defendant.

Filed December 9, 1925. [66]

AND AFTERWARDS, to wit, on the 10th day of December, 1925, there was duly filed in said court, a bill of exceptions, in words and figures as follows, to wit: [67]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that at the trial of this cause on the 27th day of July, A. D. 1925, the

Honorable Robert S. Bean, Judge presiding, the plaintiff appearing in person and by her attorneys, G. C. & A. C. Fulton, and the defendant by its attorneys, Wood, Montague & Matthiessen, a jury was duly empanelled, and the following proceedings were had:

LIFE INSURANCE POLICY.

The plaintiff then offered and there was received and read in evidence the life insurance policy described in plaintiff's complaint, its execution and delivery being admitted.

NOTE: A copy of this policy is attached to plaintiff's complaint, hence, is made a part of this bill of exceptions by reference to the copy attached to the complaint.

TESTIMONY OF JOSEPHINE STIPCICH, FOR PLAINTIFF.

JOSEPHINE STIPCICH, a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

I am the plaintiff in this case, and the beneficiary named in the life insurance policy described in the complaint. The insured Anton Stipcich was at the time of the issuance of the policy my husband. I was married to him about ten years ago.

TESTIMONY OF JULIEN COBLENTZ, FOR PLAINTIFF.

JULIEN COBLENTZ, a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

My name is Julien Coblentz. I live at Astoria, Oregon. I represent the defendant Metropolitan Life Insurance Company and have been representing it for something over five years. I recall the policy in this case. I received it from the assistant manager in charge of the company's office at Astoria, Oregon, to be delivered to Anton Stipcich, the insured. I was the one who solicited and obtained the application for the policy, and [68] following the regular custom, when the policy arrived, it was placed in my hands for delivery to the insured.

Thereupon the plaintiff offered and there was received in evidence proof tending to prove that proof of the death of the insured Anton Stipcich was duly furnished the defendant on forms prepared by it and by it received on or about the 17th day of April, 1924.

Proof of death received in evidence, marked Plaintiff's Exhibit 2A, 2B and 2C, and are made a part of this bill of exceptions. By stipulation the original are to be sent up and and not printed.

Cross-examination.

After we were informed of Mr. Stipcich's death, Mrs. Stipcich was in Portland, I believe at the time, and I called at one of her brothers and

(Testimony of Julien Coblentz.)

asked her nephew when she would return and be ready to complete the proofs of death, and at a later date, on the day before we made these papers out, she phoned me that she was ready to see us.

TESTIMONY OF W. W. BANKS, FOR PLAINTIFF.

W. W. BANKS, a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

I am a regularly licensed and practicing attorney-at-law, residing at the City of Portland, Oregon, and have been engaged in such profession for the last twenty-five years.

Thereupon, counsel for plaintiff propounded to him the following question:

Q. Mr. Banks, this is an action brought by Josephine Stipcich, the beneficiary under the twenty year life policy issued to her husband during his life time. The amount involved is four thousand dollars. The company admits the execution of the life policy, but denies its obligation to pay it, based upon, I guess, perhaps, two grounds—I think only one—well, two grounds. The first is that the insured made a false statement in his application for the policy. They also make a further contention that between the date the application was signed by the insured, and the date of the delivery of the policy to the insured, the insured had [69] suffered a severe change in his health, which he failed to report to the company. Now I

(Testimony of W. W. Banks.)

would like to have your judgment as to what you would consider reasonable attorney's fee for the plaintiff in an action of that kind, involving that amount of money, with counsel eminent as they are, in behalf of the defense.

A. From my experience, I will say that in a contested case of this nature, involving four thousand dollars, with counsel of experience, that a fee of twenty per cent of the amount involved up to five thousand dollars would be a reasonable fee.

Thereupon, the plaintiff rested.

TESTIMONY OF JULIEN COBLENTZ, FOR DEFENDANT.

The defendant, in order to sustain the issues on its part, called as a witness on its behalf, JULIEN COBLENTZ; he having been previously sworn, testified as follows:

I am agent for the defendant Metropolitan Life Insurance Company, residing at Astoria, Oregon, an agent unattached. It is my duty to solicit for insurance, collect premiums when they are due. I have nothing to do with the acceptance of risks or the issuance of policies.

Thereupon, he was asked by counsel for defendant the following questions:

Q. Do you recall the circumstances of the application for this policy? A. Yes.

Q. You may state what they were, and when?

A. Well, I might preface my remarks by stating

(Testimony of Julien Coblentz.)

that for a period of about seven months I was on disability. I had been injured in an automobile accident, and was not actively employed by the company, was what is known on disability. On the afternoon of February 16th, however, of 1924, I was at the office of the company at Astoria, and while there Mr. Stipcich and Mrs. Stipcich and their little boy called at the office, and Mr. Stipcich told me that he was now ready to apply for the insurance for which I had been canvassing him for a matter of some two years. [70] And I invited him to have a seat so he could write out the application. He said that he had no time just then, but invited me to call at his home the next day, which was Sunday. The next afternoon, after dinner, I called at his residence in company with Mr. Hoffman. Mr. Hoffman took me there in his car.

Q. Mr. Hoffman is who?

A. Assistant Manager at Astoria. Mr. Hoffman took me there in his automobile, and we discussed several plans of insurance, and different kinds of insurance, and we attempted to sell Mr. Stipcich a five thousand dollar policy, but both he and his wife thought the amount of premium involved was more than they could handle at that time. But we finally agreed on an amount of three thousand dollars, and that was Sunday, February 17, 1924. The next day, by arrangement—on February 18th Mr. Stipcich was examined by our examiner at Astoria, Dr. Waffle, E. B. Waffle.

(Testimony of Julien Coblentz.)

Q. I hand you document labeled "Application to the Metropolitan Life Insurance Company," and ask you if that is—I think that is called Part A; the first page inside of this is the application which was made out by Mr. Stipcich on that date.

A. Yes.

Q. This is his signature? A. Yes.

Q. And that is the signature of Assistant Manager Hoffman? A. Yes.

Q. How do you know that was the date?

A. Because the application was written and dated by myself at the time.

Q. You know at the time that that was the true date? A. Yes, sir.

Mr. MONTAGUE.—We offer this document in evidence, the original application; a copy set out in the pleadings, but the original instrument is of course admissible.

The said document was admitted in evidence and marked [71] Defendant's Exhibit "B," but a copy thereof being attached to the complaint is but made a part hereof by reference to such exhibit.

The original application was for Three Thousand Dollars. The policy was written for Four Thousand Dollars. This change was made at the request of Anton Stipcich, the insured.

TESTIMONY OF ARTHUR A. HOFFMAN, FOR DEFENDANT.

ARTHUR A. HOFFMAN, a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Arthur A. Hoffman.)

I am assistant manager of the defendant Metropolitan Life Insurance Company, at its office at Astoria, Oregon, and was such during all of the transactions involved in this action. My duties, function and instructions in regard to such business are in writing partly and partly verbal.

Thereupon, counsel for defendant asked the said witness the following question:

Q. What were your duties? What did you do?

To which question, the plaintiff, by her attorneys, objected, upon the ground that the same was immaterial and irrelevant; that the writing was the best evidence, and further objected to the witness answering the said question unless he produced the written orders and instructions; but the Court overruled said objection, and directed the witness to answer the same. To which ruling of the Court, the plaintiff, by her attorneys, excepted, and an exception was allowed by the Court.

A. They varied in carrying out the business of the company. We have circular letters that come in continuously, which cover our instructions, written and verbal; from time to time they may change. It is to act as the company's head agent at Astoria, in a few words, and Mr. Coblentz is one of the men; I have also three others, and I get my instructions from both Portland, San Francisco and New York.

I have no authority to pass on applications for policies or passing on the medical examination. Said witness further testified as follows: [72]

(Testimony of Arthur A. Hoffman.)

Q. Do you know how it happened that the application in this case, which was for Three Thousand Dollars, resulted in a policy for Four Thousand Dollars?

A. The policy was changed. The plan and class was changed by the head office, and notice to that effect was sent down and to be presented to Mr. Stipcich, whether he would accept it or not. This was turned over to Mr. Coblentz and he presented it to Mr. Stipcich. He also wrote a letter to San Francisco that it was Mr. Stipcich's desire to have it increased to four thousand dollars. This is as much as I know.

TESTIMONY OF HENRY G. SARPOLI, FOR DEFENDANT.

HENRY G. SARPOLI, a witness on behalf of the defendant, being first duly sworn testified as follows:

My name is Henry G. Sarpoli. I reside at Astoria, Oregon. I am by occupation a pharmacist, duly registered and licensed as such and engaged in business at Astoria, Oregon. On February 16, 1924, I filled a prescription given by Dr. Forsstrom to Anton Stipcich. I have that prescription in my possession now. By agreement the witness read the prescription to the jury, which was as follows:

A. Tony Stipcich, 562 K Avenue. Acid Hydrochloric dilute. This is diluted hydrochloric acid. Lactopepsin 15 grams. That is 15 grams dilute hydrochloric acid and 15 grams lactopepsin. Gly-

(Testimony of Henry S. Sarpoli.)

cerin 30 grams. Distilled water 120 grams and tincture of magnesia 8 grams. That is a solution of morphine sulphate.

Q. Morphine sulphate?

A. Yes, the same thing as morphine.

Q. And generally known as morphine.

A. Yes, and the direction is a teaspoonful three times a day.

TESTIMONY OF DR. WAYNE J. SLATER, FOR DEFENDANT.

DR. WAYNE J. SLATER, a witness on behalf of the defendant, after being first duly sworn testified as follows:

I am a regularly licensed and practicing physician residing and practicing my profession at Portland, Oregon, since July, 1923. [73] I am a graduate of Harvard Medical School and was associated during the year 1920 with Dr. Robert C. Coffey, who has offices in the Stevens Building, and it was a part of my duty to examine the cases that come to see Dr. Coffey, that is, I did substantially during the year 1924. I am now practicing independently. When I made an examination I made a written record thereof. These records are all made at the time of the transaction, and I wrote up the findings and then Dr. Coffey came in, and the X-ray man recorded his findings at the time he was there, and these records are made up under my personal supervision. Dr. Coffey was consulted by Anton Stipcich, the party named in the policy of insur-

(Testimony of Dr. Wayne J. Slater.)

ance in this case, during the month of March, 1924. He came in first on March 20, 1924, and he was there also on the 21st of the same month, and he was again in the office for examination on the 29th of the same month, and examinations were made at that time, and I have all the records that were made at that time. From these records, it appears that Mr. Stipcich was a man 37 years old, married, a bricklayer, born in Austria. The first time I examined him, he showed me a scar in the right rectus incision where he had an operation two years ago for perforated gastro ulcer, peptic ulcer, which was healed, so he said. The abdomen showed a tenderness in the epigastrium, which is over the stomach area and to the right—in the right hypochondrium region, with food masses felt. The balance of the physical examination is negative except two scars on his left knee where he was operated on for an antrum when he was a young boy. He had no further complaint after the operation at all. Six weeks before he came to us, however, his old trouble returned. That was his statement to me. He said he had no further trouble after his operation two years ago until six weeks before our interview, and then he had a recurrence of the pain which he had prior to the operation two years ago. He gave an ulcer history. In other words, six weeks before he came into the clinic. An X ray examination and picture was taken of [74] him and the X ray disclosed an ulcer of the pylorus. That is a report of the

(Testimony of Dr. Wayne J. Slater.)

screen, which is more important than the X-ray picture in ulcer of the stomach. An X-ray picture of an ulcer of the stomach is not worth a quarter what the screen is. The screen is a moving picture. You give this patient some barium and watch the barium as it passes down the esophagus into the stomach and until it leaves the stomach; then you can see any changes in the outline of a stomach while the barium is in the stomach The X-ray picture is just simply a picture and only shows just the stomach at one stage. There are continuously peristaltic waves over the upper stomach down towards the pylorus. You can watch the changes under the screen. You are looking at the stomach all the time while here the X-ray picture only shows one phase. Barium is merely given because it is opaque to the X-ray and you can see it easily, and so the barium in the stomach shows the outline of the stomach; shows any deformity in the stomach; shows whether a notch, or indentation, which you usually have in an ulcer; also whether any spasticity of the muscles or not. I mean by spasticity increased tonus in the muscles of the stomach. The muscles are more tight than usual. They do not relax well and generally they stay contracted more.

Now the fluorescent screen shows a moving picture of the stomach with the barium in it and shows scars or solid masses, holes or little projections from the stomach or into the stomach, and these masses or holes or projections indicate the

(Testimony of Dr. Wayne J. Slater.)

presence of something in the nature of a tumor or ulcer.

The X-ray man made a hand picture of the incidents described by the witness.

Thereupon counsel for defendant offered the same, and the same was received in evidence and marked Defendant's Exhibit "E."

NOTE.—This exhibit being a pen picture it is deemed advisable to forward the same separately to the court as it is not of sufficient importance to print the same. [75]

Q. Did you advise Mr. Stipcich on the strength of these X-rays?

A. Well, on that and the history, yes, and the findings.

Q. The result of the entire examination?

A. Yes.

Q. Of which this formed a part? A. Yes.

Q. Now, you may state what result—in as non-technical language as you can—what the result of the examination and X-rays was as to the condition of Mr. Stipcich at the time the examination was made?

A. We made a diagnosis of a peptic ulcer at the time of his examination; that was the result of the examination. That is what you wanted to know—what was the matter with him?

Q. Did the examination show anything with respect to the obstruction of the stomach and the passing out of its contents?

A. Well, the contents of the stomach didn't pass out as freely as normally.

(Testimony of Dr. Wayne J. Slater.)

Q. What is the technical term of that stoppage or obstruction of the contents?

A. That would be obstruction—is the common term. There was—the contents of the stomach didn't pass out as freely as normally.

On redirect examination, said witness further testified, in answer to interrogatories propounded to him by counsel for defendant, as follows:

Q. In your examination—did you have an opinion, on your examination as to whether the man at that time had an ulcer or not? A. Yes.

Q. And that opinion was?

A. That he had an ulcer.

Q. Could you tell whether the ulcer was a new one or an old one? A. No. [76]

Q. What is the relation of the pyloric part of the stomach and the duodenum to the other? Will you explain that briefly?

A. The pyloric end of the stomach connects the duodenum and the duodenum is the beginning of the small intestines. The pyloric end of the stomach is tissue—consists of the same kind of tissues, practically, but is a valve there, a pyloric valve, which indicates the separation between the two; they are all made of smooth muscles which give a peristaltic action to the areas, and connective tissues, blood vessels and nerves, and the epithelim which lines the stomach is continued down into the stomach, although the esophagus, the duodenum and the stomach are different.

Q. Are you always able to tell definitely and cer-

(Testimony of Dr. Wayne J. Slater.)

tainly whether an ulcer disclosed on examination is in the duodenum or stomach?

A. You can't always be sure exactly where an ulcer is, I mean within a very short distance, because according to this record, it is right at the juncture of the two, the record shows.

TESTIMONY OF MARGARET E. TYNON, FOR DEFENDANT.

MARGARET E. TYNON, called by defendant and duly sworn, testified that she was the record librarian at St. Vincent's; kept a record of the examinations made of patients; and produced a record which shows that Anton Stipcich was in the hospital from March 9th to March 24th, 1924, had X-rays made and then was discharged from the hospital.

TESTIMONY OF DR. TOIVO FORSSTROM, FOR DEFENDANT.

DR. TOIVO FORSSTROM, a witness on behalf of defendant, after being first duly sworn, testified as follows:

I am a regularly licensed and practicing physician in Oregon, where I have been practicing since 1905. I reside at Astoria, Oregon. I was acquainted with decedent Anton Stipcich during his lifetime. I operated on him for a gastric ulcer January 13, 1922, and he consulted me after that.

Q. There have been introduced in evidence here two documents of which this paper I hand you is

(Testimony of Dr. Toivo Forsstrom.)

a copy. They are marked Defendant's Exhibits "C" and "D." Will you look them over. Are those correct copies of prescriptions given by you to Mr. Anton Stipcich? A. Yes, sir. [77]

Q. And Mr. Stipcich consulted you at that time?

A. Yes, he came to my office and complained of a—that he had trouble with his stomach for a time; he had a little pain after eating, and of course he was working all the time, and I didn't consider it very much. He had been healthy,—perfectly healthy since I operated on him two years and a half ago. I knew for a fact that he had been working, and he came to the office and said that he had felt a little pain after eating, distress, distressed feeling, so I just wrote him a prescription. I thought there might be something in the gastric juice. I didn't think much about it. And I just saw him that once, and then some time he came back and he said he still felt a little pain there.

Q. How long was it he came back from this February 16th?

A. I couldn't say exactly the date. We were just talking a few words in the office. I told him that if the distress got worse he ought to have an X-ray picture taken; that my X-ray machine was out of order, so I couldn't do it myself. So the next thing I heard about it he had went to Portland and come back to me, but it was several weeks, over a month. Afterwards he came back and told me he had consulted a physician in Portland, and he had taken an X-ray picture of him, and also

(Testimony of Dr. Toivo Forsstrom.)

told him that he thought there was another ulcer had formed.

Q. Told you that the physician had reported that Stipcich thought another ulcer?

A. No, the physician told Stipcich; that physician who examined him, told him was another ulcer, and told him he had to be operated on.

Q. That he had to be operated on?

A. So he asked me my advice, and I told him, "That physician he is all right, you can depend upon him. I knew him personally very well," and said, "You can put your life in his hands all right."

Q. You advised the operation?

A. Yes; I didn't know the details. [78]

Q. I mean you advised him to submit to an operation? A. Yes.

Q. Who was the other physician, Doctor?

A. Dr. E. A. Sommer.

Q. You don't remember the date of that?

A. No, I don't. We were just talking. I was very busy in the office, and he just came in and asked my advice, and I told him that if Dr. Sommer told that advice, you can depend on it, it is so, because he told him the truth; and the next I heard about it Stipcich was dead.

Q. How long was it—do you remember how long after he consulted you that you heard he was dead?

A. Might have been a week or two afterwards. So I called up Dr. Sommer over the phone and

(Testimony of Dr. Toivo Forsstrom.)

asked about the operation, and he told me what it was.

Q. You furnished the proof of death—furnished a document to the Metropolitan Life Insurance Company at their request, which I hand you, marked Defendant's Exhibit "A" for Identification. Is that a document which you furnished at that time? A. Yes, that is my writing.

Q. And it is stated in that document that the date of your first attendance in Mr. Stipcich's last illness was February 10th?

A. Yes. At that time I told the party who came to ask me that I had no records, that I couldn't remember; and he said, "Well, it must have been about that time"; if you say it was that time, I told him; I didn't have any records of it; the only record later on I saw at the drugstore that my prescription was dated February 16th.

Q. Then February 16th is the date to which you refer in that document erroneously as February 10th?

A. Yes, sir. I am acquainted with the statistics of results of operations for gastric or peptic ulcers. I think the mortality depends upon who [79] is the surgeon. I cannot tell exactly, but I think the average mortality must be very near four or five per cent.

Cross-examination.

(Questions by Mr. FULTON.)

Q. You had known Anton Stipcich, you say, Doctor, for several years? A. Yes.

(Testimony of Dr. Toivo Forsstrom.)

Q. What sort of a looking man was he?

A. Oh, he was a healthy man; he was a healthy man. Tall, muscular fellow,—hard-working man.

Q. And this day that he called upon you at your office, what was your judgment of the condition of his health?

A. His health had been perfect since I operated, and he didn't—he looked perfectly as well as before. The only thing, as I mentioned, was that he complained of some distressed feeling after eating, some pain.

Q. Is this distressed feeling after one has eaten, is that an uncommon complaint? A. No.

Q. And you wrote out for him a prescription?

A. Yes.

Q. Well, unfortunately referring to it yesterday, I was a little abrupt, I am frank to say. What was that, just an ordinary laxative?

A. I think that prescription contained hydrochloric acid, pepsin, and a little peppermint water, and glycerin, then I added a little morphine preparation, morphine to relieve that pain.

Q. What was the object of giving it?

A. Just to aid the digestion; the same constituents as the gastric juices, hydrochloric acid and pepsin.

Q. What did you tell him at that time?

A. I didn't make any examination of him at all. Just talking, and I questioned him and asked a few questions, and I just wrote that and said, "If you don't feel relieved you let me know." [80]

(Testimony of Dr. Toivo Forsstrom.)

Q. Did you tell him you felt there was nothing wrong with him, he was all right?

A. I couldn't see anything wrong.

Q. Did you tell him that?

A. Yes, I told him I didn't think it amounted to much.

Q. And so you gave him this?

A. The man was working.

Q. Working right then, right along? A. Yes.

Q. What was he working at?

A. He was a brick-mason.

Q. How long after that did he continue to work, or do you know? A. I don't know.

Q. Now you say that some time after that he came down and wanted you to take some X-ray pictures? A. Yes, it was my suggestion.

Q. Your suggestion he came down. The object of taking the X-ray pictures was what?

A. Was to see if there should have been—I know what I have operated on him for, and I wanted to see if there possibly could be some recurrence of it, of that ailment he had had.

Q. And you advised him then to come to Portland?

A. No. I told him at that time my X-ray machine was out of order and I couldn't do it myself, and he either had an X-ray picture taken at the hospital that had a machine there, or came to Portland. That is all right there.

Q. Did you see the X-ray pictures?

A. No, sir.

(Testimony of Dr. Toivo Forsstrom.)

Q. But you say he was in your office some time prior to the date of his death?

A. Yes, after—

Q. After he had taken the X-ray picture?

A. Yes, after he had made the trip to Portland.

Q. And got the X-ray picture? [81]

A. Yes. He came to my office and he told me he had had pictures taken here and consulted a surgeon here, and he advised him to be operated.

Q. Now, you think that was over a day or two, or three or four days before he died?

A. Oh, yes, more than that.

Q. Are you sure of that, Doctor?

A. Yes, I think it was, because I don't think he went—might have been about a week or so passed after that time.

Q. But it was after he had his X-ray pictures taken? A. That he came to me.

Q. How long after,—do you know?

A. I couldn't tell you exactly; he didn't mention the date; very likely it was a few days after; very likely it was a few days after; I didn't ask him.

Q. You are not certain about this; it has been some time ago, Doctor, you are not certain?

A. No, I couldn't say.

Upon redirect examination, said witness testified as follows:

(Questions by Mr. MONTAGUE.)

Q. Just a word, Doctor. You suggested to Mr. Stipcich when he came to see you if the pain didn't subside he should come again?

(Testimony of Dr. Toivo Forsstrom.)

A. Yes. I told him if he didn't get relief from this medicine I gave him, because at the time I considered that as just a little trifle; naturally I should think there would be some recurrence of it, because I knew what had been before.

Q. That occurred to your mind, might be a recurrence? A. Yes, but never mentioned to him.

Q. Do you know how long he had been suffering pain at the time he first came to you?

A. No, he didn't say, but some time.

TESTIMONY OF DR. E. A. SOMMER, FOR DEFENDANT.

Dr. E. A. SOMMER, a witness on behalf of defendant, after being first duly sworn, testified as follows:

I am a regularly licensed physician and surgeon in Oregon, and I have been practicing my profession since 1880. I have had extensive practice in surgery. [82]

I was acquainted with the decedent Anton Stipcich during his lifetime. He was in my office on March 7th or 8th, 1924—I do not recall the exact date—whether he called on the 7th and went to the hospital on the 8th, I am not sure, but on the 8th I started his examination,—that is, on that date, I sent him to St. Vincent's Hospital, at Portland, Oregon, where I had him examined for gastro-intestinal examination. I examined him myself. He left the hospital again on March 14, 1924, and I made a diagnosis of a duodenal ulcer.

(Testimony of Dr. E. A. Sommer.)

Q. And what was your advice to Stipcich?

A. My advice to him was that as these ulcers of the type he had at that time were lifelong disturbances unless they were healed, that I felt that it was an operative procedure instead of medical. I advised him that he could live a long time with it, or he might have trouble at any time; that he had had trouble before, and I advised surgical interference. Back of this condition, ulcers heal and ulcers break down, and from the history here I had every reason to feel that the primary ulcer for which he was operated on, and from our experience we have in perforated ulcers, that when they perforate they heal, a large percentage of them, and that he might have a new ulcer develop. It is an uncommon condition that people who have been operated on and a gastro-enterostomy performed that they are not always perfectly well after an operation of that type; that is, they may have gastric symptoms; symptoms of distress, or symptoms of disturbances following an operation even without an ulcer being present. The ulcer here was excised and this opening made. He had an ulcer on the posterior surface of the duodenum when I went in.

Q. Were you through, Doctor? I don't want to interrupt. Subsequently you performed an operation on Mr. Stipich? A. I did; yes.

Q. And your operation—what was disclosed by your operation with respect to confirming or modifying your diagnosis?

A. That corroborated our diagnosis. [83]

(Testimony of Dr. E. A. Sommer.)

Q. Was there at the time you made the diagnosis evidence of a fresh stoppage, or any stoppage, of the fluid contents of the stomach into the intestines?

A. He had this ulcer here. (Referring to diagram in blackboard not preserved.) This represents the lower intestines; this the stomach and this the duodenum. The opening that was made by Dr. Forrstron here, with the excision of the ulcer, taking out, cutting out the ulcer, he evidently functioned for a long time perfectly properly, because this opening closed up.

Q. The opening that was made by the operation closed up?

A. By the primary operation, virtually closed up. Scar tissue around there very small, and that is what we claim didn't function. In the X-ray picture taken—we were concerned in this operation, concerned with the ulcer here; was the same type ulcer that he had originally only in a different place, which had perforated, but had perforated not as it had before; started from here, and allowed the contents to pour freely into the abdomen. We knew one operation which had been operated on; we didn't know how many he had; whether had more than the primary and secondary, or whether had others, and adhesions now, that is the perforation had attached itself to the liver. Reopening of the gastro-enterostomy, and the opening here, with another ulcer having formed here would not be proof that he might not have developed another

(Testimony of Dr. E. A. Sommer.)

one had he lived, by opening this portion here, because in the present light of gastric surgery—this portion from here on to the third portion—this part about here, is what we call the ulcer-bearing area of the stomach, and if you open—make an opening here to relieve the stomach, draining it, that does not relieve the definite cause that produces the ulcer. A matter of constitutional condition. We don't know; we think at times we can tell, but we don't know the cause definitely that produces an ulcer in the stomach, because we operate on them and they are well, and they return again with an ulcer. So in modern science—art as we wish to call it—we have discovered that if we remove this part of the stomach, get down to a certain portion of the second [84] part of the duodenum, the ulcers are very few in this third portion. They are very common in the first and second portions.

Q. The first portion of the stomach and the second of the duodenum?

A. The first portion of the duodenum and the second portion of the duodenum. We put the stomach here, the pyloric here; in through here is the ulcer-bearing area. If we can resect, take off this, take it all off here and attach this part to this part of the bowel, these people do not have a recurrence as a rule. The mortality for your operations for ulcers runs from two and a half to fifty per cent.

Q. From two and a half to fifty per cent?

A. From two and a half to fifty per cent. If

(Testimony of Dr. E. A. Sommer.)

you have a simple peptic ulcer here and have a gastro-enterostomy done it will not be more than two and a half per cent. No person can tell. No person can tell at the time he goes in what he is going to meet. This condition here, he had an ulcer in the duodenum, duodenal ulcer. People can live with them, twenty, twenty-five or thirty years, have them all their lives and die from some other causes. But where you have a perforation, as you had in this case here, posterior of the liver, our mortality jumps very high, because we had an ulcer bed in here and by removing this, we evidently had an infection which produced peritonitis, from which he died.

Q. That complication in a certain percentage of cases is inevitable with the best surgery that has yet been discovered, is it not, Doctor?

A. Every man that does that has to experience these unfortunate results.

Witness identified Plaintiff's Exhibit 20 as having been made in his office. [85]

TESTIMONY OF DR. EDWARD B. WAFFLE, FOR DEFENDANT.

DR. EDWARD B. WAFFLE, a witness on behalf of defendant, after being first duly sworn, testified as follows:

I am a regularly licensed physician and surgeon in Oregon, and have been such for seventeen years. I reside at Astoria, Oregon, and am engaged in active practice there. I was one of the examiners

(Testimony of Dr. Edward B. Waffle.)

for the Metropolitan Life Insurance Company at Astoria, Oregon, during the year 1924. I remember taking the application of Anton Stipcich for life insurance. I identify Defendant's Exhibit "B" as the application that was made out at that time (copy attached to complaint). The application contains Sheet "A" made and signed by the applicant. Sheet "B," applicant's statement to the medical examiner, which is not signed by the applicant. I made the statements and answers exactly as they were given to me by Stipcich. The questions and answers cover the entire conversation had between Mr. Stipcich and myself. I made no X ray or other examination of him. My examination was simply a physical examination. At the time I made the examination, I found no evidence of the existence at that time of an ulcer, that is, from the character of the examination that I made. The average mortality in cases of an ulcer, such as described in this case, that is, an operation for an ulcer, depends upon the clinic's and the operating surgeon's ability—said to be from two per cent to five per cent. Subsequent call about two weeks after; submitted specimen.

TESTIMONY OF ARTHUR A. HOFFMAN, FOR DEFENDANT (RECALLED).

ARTHUR A. HOFFMAN, a witness previously sworn, was recalled and testified in response to interrogatories propounded to him by counsel for defendant as follows:

(Testimony of Arthur A. Hoffman.)

Q. I believe you testified you are manager of the office at Astoria? A. Yes, sir.

Q. Did the office at Astoria have any information concerning the visits of Mr. Stipcich to Portland, his consultation with physicians, or his having X-rays? A. It did not. [86]

Cross-examination.

(Questions by Mr. FULTON.)

Q. That is the office at Astoria? A. Yes.

Q. You are only speaking for the Astoria office?

A. Yes.

Q. What is the fact as to the procedure in your office with respect to making reports of business originating or arising there, to the home office?

A. Any matters that come up whatever in connection with the Home Office, I mail them and send them away myself. There is no one else in the office there who handles that at all. I receive and deliver all mail, so if there was any reports coming in or going out they go through me, no one else.

Recross-examination.

(Questions by Mr. FULTON.)

Q. Were you in the city of Astoria between March 17th and April 26th? A. March 17th

Q. 1924?

A. And April 26th.

Q. February 18th, 1924, and March 26th, 1924.

A. I couldn't say.

Q. What? A. I don't recall.

(Testimony of Arthur A. Hoffman.)

Q. You don't remember whether you were gone or there all the time or not? A. I don't recall.

Q. Mr. Hoffman, under the practice of the company, would you have delivered the policy to Mr. Stipcich if you had known at the time the policy was ready to be delivered that he had been to Portland, consulted physicians, been some six days in the hospital, had an X-ray picture taken and been advised to submit to an operation? [87]

To which question plaintiff objected as calling for a conclusion. Objection overruled and exception allowed.

A. I am instructed by the company that if there is anything coming up in that nature to write them for instructions.

Mr. FULTON.—Is that in writing or verbal?

A. We have a circular letter that comes down to us and we have a rate book. The instructions are in printing.

Objection renewed. Defendant consents that answer may be stricken out.

Q. What is the practice?

A. Under the practice of the company as observed and carried out, what would you have done in respect to the delivery of this policy, if you had been informed of the facts which I mention?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled, exception saved.

A. Wired head office and waited instructions.

Q. Do you know what would have been done in

(Testimony of Arthur A. Hoffman.)

der the practice of the head office as to delivery of the policy?

Objection renewed, overruled, exception saved.

A. I think the company would have instructed me to return the policy to the head office.

Recross-examination.

(Questions by Mr. FULTON.)

Q. Would you be kind enough to tell us, Mr. Hoffman, how many cases of this kind have come up to you while you have been in Astoria,—similar to this?

A. None that I recall similar to this.

Q. You never had any other experience of this kind before? A. Not personally. No.

Whereupon counsel for plaintiff moved to strike out the testimony on the grounds that it was incompetent, irrelevant and immaterial.

COURT.—As I said a moment ago, I think the question is wholly immaterial. A question of law. If conditions had changed so [88] that the company was not obliged to deliver the policy, then it doesn't make any difference what the practice of the company was.

The defendant produced evidence of the tender pleaded in its answer, the tender being admitted as alleged.

Thereupon the defendant rested.

The plaintiff thereupon produced the following testimony in rebuttal.

TESTIMONY OF MRS. JOSEPHINE STIPCICH, FOR PLAINTIFF (IN REBUTTAL).

(Questions by Mr. FULTON.)

Mrs. Josephine Stipcich:

Q. You have testified you are the plaintiff in this case once before, and that you were the wife and are now the widow of Anton Stipcich, deceased?

A. Yes.

Q. Who had this policy? What was the name of the agent who solicited this policy?

A. Julien Coblentz.

COURT.—We will take that for granted. He testified so we do not need to take up any time on that question.

Q. Were you with your husband when he was in Portland? A. Yes.

Q. And had the X-rays taken?

A. No, I wasn't with him when he had the X-rays taken, but I came up afterwards.

Q. And did you have a talk with Dr. Sommer while your husband was present?

A. Yes, had a conversation.

Q. What was it that Dr. Sommer said to him at that time?

A. Dr. Sommer told me that my husband was in good physical condition. [89]

Q. Your husband was present?

A. Yes, my husband was there. That was before he made up his mind to have the operation. He told me his condition was not serious, he was in

(Testimony of Mrs. Josephine Stipcich.)

good physical condition and he better go, and then he made his mind up and went.

Q. Did Dr. Sommer tell your husband, or you, in your husband's presence, what was the matter with him?

A. No, he told me that it was something wrong; he didn't mention ulcer; he said it might be an ulcer but he didn't know. It was something, but it wasn't very much, but it might give him trouble later, or when he gets older, and he'd better go right then.

Q. Did Dr. Sommer say anything about the old operation, the former operation that Drs. Forsstrom and Finch had performed?

A. Yes; he told me that it might cause trouble from his first operation.

Q. Do you recall when your husband returned after he had had X-ray pictures taken? Do you recall when he came back to Astoria?

A. What is it?

Q. He was up to Portland, you know, and visited Dr. Sommer. A. Yes.

Q. And do you remember when he came back?

A. Yes.

Q. Do you remember what date it was?

A. No, I don't remember the date.

Q. But he did make a trip back to Astoria?

A. Yes.

Q. And then came back for the operation?

A. No, then he went to Dr. Coffey.

A. Mr. Coblentz was up to the house to talk things over, I told him the condition of my hus-

(Testimony of Mrs. Josephine Stipcich.)

band; my husband told me so. He told me not to take the advice from one doctor, to go and consult Dr. Coffey, because he was the best surgeon in Portland.

Q. You told Mr. Coblentz? A. Yes. [90]

Q. What did you tell Mr. Coblentz?

A. I told him the condition of my husband.

Q. What was that?

A. Dr. Sommer told him to come—

Q. That he had this ulcer? A. Yes.

Q. Now, what was it that Dr. Sommer said to you in that conversation you had with him when your husband was present?

A. Dr. Sommer told me that my husband might have an ulcer and may not; that he may cause—trouble may come from his first operation. He recommended surgical; it wasn't going to be serious. He was in good physical condition; that he was going to be all right. It might be an ulcer; wouldn't amount to very much.

Q. Now, after you got that, after Dr. Sommer had told you that your husband may, or he may not have an ulcer, did you have any talk with Mr. Coblentz, of the insurance company? If so, state what it was. A. With Mr. Coblentz.

Mr. MONTAGUE.—If that is intended to bind the insurance company, I object to the testimony on the ground that information to Mr. Coblentz, under the terms of the policy and rules of the agency would not in any way bind the company.

COURT.—Would not be notice to the company, because he was a mere soliciting agent.

Mr. MONTAGUE.—That is the point. And if that is the direction of this testimony, I move to have that part stricken out. This is the first time that Mr. Fulton has mentioned the company in that connection.

COURT.—Evidence as to statements to Coblentz might be competent as showing whether they realized there was any serious difficulty.

COURT.—It seems to me, that in view of this application and policy and the fact that it appears on the face of the [91] application that that was the intention, that statements made to or by an agent should not be binding on the company unless contained in the application, that mere knowledge by a soliciting agent who had no authority to deliver the policy or issue it, and whose duty it was simply to take the application and forward it to the Home Office, the Manager, or somebody that had authority to issue it, that notice to such an agent did not bring that notice to the company. I may be in error, but that is my view of the law at this time, therefore I sustain this objection.

To which ruling of the Court, the plaintiff, by her attorneys, duly excepted, and the exception was allowed by the Court.

Thereupon plaintiff, by her attorney, made the following offer of proof:

Mr. FULTON.—That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and the

(Testimony of Mrs. Josephine Stipeich.)

X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time, Mr. Julien Coblentz was agent for the defendant company. But the Court refused such offer, and did not permit the witness to answer. To which ruling of the Court the plaintiff, by her attorney, then and there excepted, and the exception was allowed by the Court.

Q. Now, after Dr. Sommer had made this examination of your husband, had taken these X-ray pictures, did you go to any other doctors?

A. He went to Dr. Coffey afterwards. [92]

Counsel for plaintiff then asked the witness the following questions:

Q. Don't answer this question until the objection is made. Who suggested that you should go to see Dr. Coffey?

Mr. MONTAGUE.—That is objected to. I don't think it is material at all who suggested going to see Dr. Coffey. The same proposition anyway.

The COURT.—That is for the purpose of showing Coblentz suggested it, I suppose?

Mr. FULTON.—That is what I was trying to get at. The Court sustained said objection and refused to permit the witness to answer same. To which ruling of the Court, the plaintiff, by her at-

(Testimony of Mrs. Josephine Stipcich.)

torney, then and there excepted, and the exception was allowed by the Court.

Counsel for plaintiff made the following offer of proof:

Mr. FULTON.—If the witness were permitted to answer that question, she would state that her husband went to Dr. Coffey at the suggestion of Mr. Coblentz.

But the Court refused such offer, and did not permit the witness to answer. To which ruling of the Court, the plaintiff, by her attorney, then and there excepted, and the exception was allowed by the Court.

Q. Now, Mrs. Stipcich, did you go to Dr. Coffey?

A. Yes.

Q. What did Dr. Coffey do? Did Dr. Coffey examine him? A. He took an X-ray.

Q. He took an X-ray?

Q. What advice did Dr. Coffey give at that time, what did he say about your husband's condition?

A. Similar advice as Dr. Sommer did.

Q. What did he say in regard to whether a serious operation or otherwise?

A. No, he told me was not serious.

Q. What did he say? What were the words he used, if you remember? [93]

A. The same words as Dr. Sommer. He told me the same thing Dr. Sommer did.

Q. I know. What did he say?

A. My husband was in good physical condition; he was a strong man and his operation would not amount to much, it was not serious.

(Testimony of Mrs. Josephine Stipeich.)

Cross-examination.

(Questions by Mr. MONTAGUE.)

Q. When did you first come to Portland after you got out this application?

A. I don't know, I don't remember the date.

Q. Well, it was early in March, wasn't it?

A. Yes, March 26th, I think it was.

Q. The first time?

A. When I came with my husband.

Q. That was the first time you came with your husband? A. Yes, when I came with him.

Q. Well, Mrs Stipeich, the evidence here shows that your husband came to Portland about March 7th, or March 8th, the first time.

A. He came alone. [94]

Q. You didn't go with him that time, and you didn't hear any conversations that took place at that time? A. No, but I heard afterwards.

Q. Well, that is another story. The evidence also shows that on March 20th your husband went to Dr. Coffey's office, and that Dr. Stater examined him there. Were you with him at that time?

A. No, I came afterwards.

Q. You came afterwards? A. Yes.

Q. And you were not here then the week of March 7th, or the time, whenever it was, that he came subsequently and went to Dr. Coffey's office?

A. No.

Q. The first time you came was when he came—

A. March 26th.

(Testimony of Mrs. Josephine Stipcich.)

Q. March 26th. And then you went to Dr. Coffey's office March 26th or a day or two after that?

A. No, we didn't go right away. He didn't make up his mind he was going to have the operation yet. We were here twelve days before he made his mind to have the operation.

Q. Twelve days? A. Eight or ten.

Q. The operation was on April 3d, wasn't it?

A. 5th.

Q. I beg pardon. Went to the hospital on April 3d? A. Yes, in the hospital.

Q. That was eight days after. He was eight days making up his mind. Did he go to visit other doctors? A. No.

Q. Nobody but Dr. Coffey?

A. And Sommer.

Q. And you didn't come to Portland, from Astoria to Portland at all, until March 26th?

A. No. [95]

Q. How did you happen to go to the office of the Insurance Company on Saturday, March 16th, do you know? A. March 16th?

Q. February 16th,—I beg your pardon, February 16th.

Q. Mrs. Stipcich, will you look at this paper I hand you, marked Plaintiff's Exhibit 2A, and see if that is your signature down there at the bottom?

A. Yes.

Q. And this was made up for you by—in the Metropolitan office, was it, or was it there you were staying? A. Where?

(Testimony of Mrs. Josephine Stipcich.)

Q. This was made out and you signed it at home, didn't you?

A. Well, either home or the office; I can't remember.

Q. You can't remember whether at home or in the office? A. No.

Q. You gave the answers that were written down there, didn't you? A. Yes.

Q. Well, how did you happen to say, in answer to Question 11, which question asks the names of every physician who attended the deceased during his last illness and during two years prior to death, that Dr. Sommer did, and that the first date of their attendance was March 31st. How did you come to say that when you knew that Mr. Stipcich had gone to Portland and consulted not only Dr. Sommer, but Dr. Coffey, and that he came here March 7th and again on March 20th?

A. Well, I don't know, maybe I wasn't positive, but—I don't know why they should put that date. Maybe I didn't know that date. I don't know why that date is there.

Q. That is the date you gave, isn't it? You gave that date, didn't you? A. March 31st?

Q. Yes. [86]

A. Well, I don't know whether I did or not.

Q. You can't say you didn't, can you?

A. Well, I can't deny it; I don't know.

COURT.—Did I understand you to say the first time you were in Portland with your husband was March 26th? A. Yes.

(Testimony of Mrs. Josephine Stipcich.)

COURT.—Then I assume that the conversation that you had with Dr. Sommer was on that date or later? A. It was later.

COURT.—It was later than that?

A. Maybe it was a few days later, yes. We didn't go to see him right away.

COURT.—How about the conversation you had with Dr. Coffey?

A. Well, I went to—my husband didn't know which doctor he was going to—

COURT.—I know. But about the time? It was after the 26th? A. Yes, after the 26th.

Mr. MONTAGUE.—I think I would like to present a motion for a directed verdict at this time, and I presume that the jury may take a recess while we are discussing it.

COURT.—This policy, or this application, provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The policy was issued on the 26th of March. The date of delivery has not been shown by the testimony, but assuming that it was delivered on that day—but there is no proof on that subject—I understand the law to be, and so stated on the demurrer, that if this application and policy were to take effect from the date of its issue, the obligation of the applicant to make full disclosure of his physical condition continues to the completion of the contract, that would be down to the issuance of the policy, and any material change

in the condition of his health before the consummation of the contract, before the issuance of the policy in this case, should have been reported to the company. [97]

Now the evidence shows, and I don't see that there is any room for controversy about it, that soon after this application was made the applicant appeared here in Portland and consulted Dr. Sommer about his physical condition, and after an examination, and being under observation for five or six days, the doctor advised that he probably had an ulcer, or concluded that he probably had an ulcer, and so advised the applicant, and advised him to submit to an operation. Now, he wasn't satisfied with that, so he went to another physician along about the 20th of March, and obtained the same information, and that certainly was enough to advise him of the change in the condition of his health, and it was information that I think he was obliged and in duty bound to communicate to the insurance company, because if he had communicated it to the company that after the application he had consulted a physician and been advised he was afflicted with an ulcer, and to submit to an operation, it would be up to the company to determine whether or not it would issue the policy, but it was his duty to communicate that fact to the company, and not having done so, or if he didn't do so, it would seem to me that would void the policy.

Now, on the question of whether he did or not, there is no direct evidence, but there is evidence by the manager at Astoria, that no such communica-

tion was made to him, or through his office to the company, and in addition to that the company issued and delivered the policy, based upon the original application, and upon the original application, and attached to the policy were particular declarations that it was acting upon that application alone. So I think it would be futile for the Court to hold that there was any proof on this contention that this condition of the applicant had been in fact communicated to the company. So if I am right in my interpretation of the law covering contracts of insurance of this kind, it seems to me there is no escape from the conclusion that the motion for a directed verdict in favor of the company should be allowed. An insurance company has [98] a right under the law to be advised of the condition of the health of its applicants at the time it makes the contract, and that was not done in this case. Whatever the purpose of this gentleman may have been in these inquiries at the time and under the circumstances, and not communicating to the company his condition, but waited until after the policy had been issued before he went to the hospital for the operation, is wholly beside the question involved in this case. So I take it that under the record as it appears, the Court has no alternative but to allow this motion.

Thereupon, the Court instructed the jury to bring in a verdict in favor of the defendant. To which ruling of the Court the plaintiff, by her attorney, excepted, and the exception was allowed by the Court.

The jury thereupon, under such instructions, forthwith brought in a verdict in favor of defendant and against plaintiff, and the same was duly received and filed, and judgment entered thereon, to all of which the plaintiff excepted, and the exception was allowed by the Court. [99]

And the plaintiff prays that this bill of exceptions may be settled, allowed and approved.

G. C. & A. C. FULTON,
B.,
Attorneys for Plaintiff.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, Robert S. Bean, Judge of the United States District Court for the District of Oregon, before whom the above-entitled cause was tried, hereby certify that on this 9th day of December, A. D. 1925, and within the time allowed by the order of this Court the above and foregoing bill of exceptions was duly filed and tendered, and the same has been duly examined by the Court and counsel, after due notice to counsel for the defendant, and the same is hereby settled, allowed and approved as the bill of exceptions in this action, and the same is ordered to be filed and made a part of the records herein.

It is further certified that said bill of exceptions contains all of the testimony and evidence produced and offered at and during the trial of said cause pertaining and relevant to the questions presented in this appeal, all of the rulings of the Court as to

the law of the case and the admission and rejection of evidence and all the instructions given by the Court to the jury, pertaining and relevant thereto, and as supplementary thereto there is hereto attached, marked Exhibit "X," a transcript of the official stenographer's notes of all proceedings had, done and taken at such trial.

R. S. BEAN,
District Judge.

Filed December 10, 1925. [100]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a stipulation relative to bill of exceptions, in words and figures as follows, to wit: [101]

[Title of Court and Cause.]

STIPULATION WAIVING PRINTING PART OF BILL OF EXCEPTIONS.

IT IS STIPULATED between the parties hereto as follows, that is to say, it is believed that the bill of exceptions prepared and signed by the Court contains all of the record in this case that is pertinent and relevant to and covers all questions presented by the appeal, but in order to avoid any controversy as to the actual testimony and evidence produced, there has been attached to the bill of exceptions, and forms a part thereof, a transcript of the stenographer's notes taken at the trial. For that reason it is agreed that the transcript of the

stenographer's notes need not be copies as part of this transcript or printed, neither shall any of the exhibits except those mentioned in the original bill of exceptions be printed, but all shall be sent up separately. Of course the transcript of the stenographer's notes shall be attached to and form a part of the original bill of exceptions.

Dated this 9th day of December, 1925.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendant.

Filed December 9, 1925. [102]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a stipulation to send original exhibits to the United States Circuit Court of Appeals, in words and figures as follows, to wit: [103]

[Title of Court and Cause.]

STIPULATION WAIVING PRINTING ORIGINAL EXHIBITS.

IT IS STIPULATED that the originals of plaintiff's Exhibits 2A, 2B and 2C and the original of Defendant's Exhibit "B" and Exhibit "X" be forwarded to the United States Court of Appeals as a part of the bill of exceptions but need not be printed, but shall have the same force and effect as if printed.

Dated this 9th day of December, 1925.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendant.

Filed December 9, 1925. [104]

AND AFTERWARDS, to wit, on the 16th day of December, 1925, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [105]

[Title of Court and Cause.]

PRAECIPE DESIGNATING PARTS OF RECORD TO BE INCLUDED IN TRANSCRIPT ON WRIT OF ERROR.

To the Clerk:

You are directed to make a transcript of record in this cause to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the writ of error allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers, to wit:

(1) Complaint.
(2) Order of Circuit Court for Clatsop County, removing the cause to this court.
(3) Answer.
(4) Reply.
(5) Judgment.
(6) Order extending time for plaintiff to file a motion for a new trial.

(7) Motion for new trial.
(8) Order overruling motion for new trial.
(9) Opinion of Court overruling motion for new trial.
(10) First order extending time to file bill of exceptions.
(11) Second order extending time to file bill of exceptions.
(12) Bill of exceptions.
(13) Stipulation waiving printing of exhibits.
(14) Stipulation waiving printing part of bill of exceptions.
(15) Petition for writ of error and allowance.
(16) Assignments of error, proof of service.
(17) Bond for writ, and approval.
(18) Writ of error and proof of service.
(19) Citation, proof of service.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

Copy served on attorney for defendant by mail Dec. 15, 1925.

G. C. FULTON,
Attorney for Plaintiff.

Filed December 16, 1925. [106]

AND AFTERWARDS, to wit, on Friday, the 15th, day of January, 1926, the same being the 63d judicial day of the regular November term of said Court,—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [107]

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 15, 1926—ORDER RE FORWARDING OF ORIGINAL EXHIBITS.

Pursuant to the stipulation of the parties filed herein,—

IT IS ORDERED that the Clerk of this court send to the United States Circuit Court of Appeals for the Ninth Circuit, with the transcript of record on writ of error in this cause, all of the exhibits in this cause.

R. S. BEAN,
Judge.

Filed January 15, 1926. [108]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the annexed writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from three to one hundred and eight inclusive, constitute the transcript of record upon

said writ of error in a case in said court in which Josephine Stipcich is plaintiff and plaintiff in error, and Metropolitan Life Insurance Company is defendant and defendant in error; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error and is a full, true, and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $42.65 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 26th day of January, 1926.

[Seal] G. H. MARSH,
Clerk. [109]

[Endorsed]: No. 4764. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Stipcich, Plaintiff in Error, vs. Metropolitan Life Insurance Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed January 28, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY (a Corporation),

Defendant in Error.

STATEMENT OF ERRORS UPON WHICH PLAINTIFF IN ERROR INTENDS TO RELY.

Plaintiff in error hereby files a statement of errors upon which she intends to rely, to reverse the judgment entered in the court below.

(1) The Court erred in sustaining and in not overruling the objection of counsel for defendant to and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

> Q. Now, after you got that, after Dr. Sommer had told you that your husband may or he may not have an ulcer, did you have any talk with Mr. Coblentz, of the insurance company? If so, state what it was.

(2) The Court erred in denying and rejecting the following offer of proof, being an offer of proof made in response to the question set forth in Assignment of Error No. 1 hereof, and in not permitting

the plaintiff Josephine Stipcich, whilst a witness in her own behalf to produce the following testimony, to wit:

> That if the witness were permitted to answer the question propounded and such question as would properly bring this matter out, she would testify as follows: That after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the doctor had recommended an operation, possibly for an ulcer; that the doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time, Mr. Julien Coblentz was agent for the defendant company.

(3) The Court erred in sustaining and in not overruling the objection of counsel for the defendant to, and in not permitting plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

> Q. Who suggested that you should go to see Dr. Coffey?

(4) The Court erred in denying and rejecting the following offer of proof and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to testify to the following facts, being the offer of proof in response to the ques-

tion set forth in Assignment of Error No. 3 above, namely:

> If the witness were permitted to answer that question, she would state that her husband went to Dr. Coffey at the suggestion of Mr. Coblentz.

(5) The Court erred in granting and in not overruling the motion of defendant for an order directing the jury to return a verdict in favor of the defendant.

(6) The Court erred in taking from the jury the right to pass upon the issues of fact in this case.

(7) The Court erred in instructing the jury to bring in a verdict in favor of the defendant and against the plaintiff.

(8) The Court erred in entering a judgment in favor of the defendant and against plaintiff.

(9) The Court erred in adjudging and declaring the following to be the law of the case, namely:

> It seems to me, that in view of this application and policy and the fact that it appears on the face of the application that was the intention, that statements made to or by an agent should not be binding on the company unless contained in the application, that mere knowledge by a soliciting agent who had no authority to deliver the policy or issue it, and whose duty it was simply to take the application and forward it to the Home Office, the Manager, or somebody that had authority to issue it, that notice to such agent did not bring that notice to the Company. I may be in error, but that

is my view of the law at this time, therefore I sustain this objection.

(10) The Court erred in declaring and adjudging the following to be the law of this case, namely:

This policy, or this application, provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The policy was issued on the 26th of March. The date of delivery has not been shown by the testimony, but assuming that it was delivered on that day—but there is no proof on that subject—I understand the law to be, and so stated on the demurrer, that if this application and policy were to take effect from the date of its issue, the obligation of the applicant to make full disclosure of his physical condition continues to the completion of the contract, that would be down to the issuance of the policy, and any material change in the condition of his health before the consummation of the contract, before the issuance of the policy in this case, should have been reported to the company.

Now, the evidence shows, and I don't see that there is any room for controversy about it, that soon after this application was made the applicant appeared here in Portland and consulted Dr. Sommer about his physical condition, and after an examination, and being under observation for five or six days, the doctor advised that he probably had an ulcer, or concluded that he probably had an ulcer, and so ad

vised the applicant, and advised him to submit to an operation. Now, he wasn't satisfied with that, so he went to another physician along about the 20th of March, and obtained the same information, and that certainly was enough to advise him of the change in the condition of his health, and it was information that I think he was obliged and in duty bound to communicate to the insurance company, because if he had communicated it to the company that after the application he had consulted a physician and been advised he was afflicted with an ulcer, and to submit to an operation, it would be up to the company to determine whether or not it would issue the policy, but it was his duty to communicate that fact to the company, and not having done so, or if he didn't do so, it would seem to me that would void the policy.

Now, on the question of whether he did or not, there is no direct evidence, but there is evidence by the manager at Astoria, that no such communication was made to him, or through his office to the company, and in addition to that the company issued and delivered the policy, based upon the original application, and upon the original application, and attached to the policy were particular declarations that it was acting upon that application alone. So that I think it would be futile for the Court to hold that there was any proof on this contention that this condition of the applicant had been in fact communicated to the

company. So if I am right in my interpretation of the law covering contracts of insurance of this kind, it seems to me there is no escape from the conclusion that the motion for a directed verdict in favor of the company should be allowed. An insurance company has a right under the law to be advised of the condition of the health of its applicants at the time it makes the contract, and that was not done in this case. Whatever the purpose of this gentleman may have been in these inquiries at the time and under the circumstances, and not communicating to the company his condition, but waited until after the policy had been issued before he went to the hospital for the operation, is wholly beside the question involved in this case. So I take it that under the record as it appears, the Court has no alternative but to allow this motion.

In addition to the above, the plaintiff in error designates the parts of the record which he thinks necessary for the consideration of such assignments of error, namely:

(1) Complaint.

(2) Order of Circuit Court for Clatsop County, removing the cause *of* the District Court of the United States for the District of Oregon.

(3) Answer.

(4) Reply.

(5) Judgment.

(6) Order extending time for plaintiff to file a motion for a new trial.

(7) Motion for new trial.

(8) Order overruling motion for new trial.

(9) Opinion of Court overruling motion for new trial.

(10) First order extending time to file bill of exceptions.

(11) Second order extending time to file bill of exceptions.

(12) Bill of exceptions.

The exhibits are not to be printed, for the reason that a stipulation has been signed between the parties waiving the printing thereof.

(13) Stipulation waiving printing of exhibits.

(14) Stipulation waiving printing part of bill of exceptions.

(15) Petition for writ of error and allowance.

(16) Assignments of error, proof of service.

(17) Bond for writ, and approval.

(18) Writ of error and proof of service.

(19) Citation, proof of service.

The above comprising the certified typewritten transcript of record certified to the above entitled court from the court below.

G. C. & A. C. FULTON,
Attorneys for Plaintiff in Error.

[Endorsed]: Statement of Errors upon Which Plaintiff in Error Intends to Rely. Filed Feb. 4, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy.

[Endorsed]: Printed Transcript of Record. Filed February 18, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4764

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF OREGON.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the 20th day of May, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

ORDER OF SUBMISSION.

ORDERED motion of defendant in error for dismissal of writ of error, heretofore filed, withdrawn.

FURTHER ORDERED cause argued by Mr. A. C. Fulton, counsel for the plaintiff in error, and by Mr. F. Eldred Boland, counsel for the defendant in error, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CERTIFYING A CERTAIN QUESTION OR PROPOSITION OF LAW TO THE SUPREME COURT OF THE UNITED STATES UNDER SECTION 239 OF THE JUDICIAL CODE.

Before GILBERT, HUNT, and RUDKIN, Circuit Judges.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"IT IS UNDERSTOOD AND AGREED:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

"2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions:

* * *

"(c). A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in conse-

quence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X-ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the

issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

> "That if the witness were permitted to answer the questions propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time Mr. Julien Coblentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the doctors consulted by the insured at Portland, Oregon. The Court below sustained an objection

to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the Court directed a verdict in favor of the defendant.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulations contained in the application for the insurance and more especially of the stipulation:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

WM. B. GILBERT,
WILLIAM H. HUNT,
FRANK H. RUDKIN,
United States Circuit Judges.

[Endorsed]: Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying a Certain Question or Proposition of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code. Filed July 17, 1926. F. D. Monckton, Clerk. By Frank H. Schmid, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-eight (138) pages, numbered from and including 1 to and including 138, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error and certified under Sub. 3 of Rule 34 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of August, A. D. 1926.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

Supreme Court of the United States

Order to Send Up Entire Record and Cause—January 9, 1928

On consideration of the motion to send up the entire record in this cause, it is now here ordered that the said motion be, and the same is hereby, granted; and the Clerk is directed to notify the parties that the order setting the cause for hearing on January 16, 1928, is revoked and the cause is set down for hearing on March 5th next.

(6)

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 97

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JULY 22, 1928

(22,100)

(32,100)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 533

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Certificate from the United States circuit court of appeals, ninth circuit	1	1
Statement of facts	1	1
Question certified	4	4
Judges' signatures	4	4
Clerk's certificate	5	5

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1927.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 4764

JOSEPHINE STIPCICH, Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Defendant in Error

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Certifying a Certain Question or Proposition of Law to the Supreme Court of the United State under Section 239 of the Judicial Code

Before Gilbert, Hunt, and Rudkin, Circuit Judges

STATEMENT OF FACTS

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"It is understood and agreed:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

[fol. 2] "2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6455 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions: * * *

"(c) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6455. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and

all provisions in the application and policy to the contrary are void and of no effect whatever."

[fol. 3] In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted he same physician and was advised that an X ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

"That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stupcich, had been examined and X ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Colbeth, [fol. 4] agent of the defendant, and told him, in the presence

of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at the time Mr. Julien Coblentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the Doctors consulted by the insured at Portland, Oregon. The court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the court directed a verdict in favor of the defendant.

Question Certified

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulations contained in the application for the insurance and more especially of the stipulation

"That any statement made to or by, or any knowledge of the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

Wm. R. Gilbert, William H. Hunt, Fr. H. Rudkin,
United States Circuit Judges.

[fol. 5] (Endorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed July 17, 1926. F. D. Monckton, Clerk, by Frank H. Schmid, Deputy Clerk.

A true copy.
Attest July 19, 1926.
F. D. Monckton, Clerk, by Frank H. Schmid, Deputy Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 6] (Endorsed:) No. 4764. United States Circuit Court of Appeals for the Ninth Circuit. Josephine Stipcich, plaintiff in error, vs. Metropolitan Life Insurance Company, a corporation, defendant in error. Certified copy of certificate certifying certain question or proposition of law to the Supreme Court of the U. S.

Endorsed on cover: File No. 32,100. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 533. Josephine Stipcich vs. Metropolitan Life Insurance Company. (Certificate.) Filed July 28th, 1926. File No. 32,100.

DENIED Oct 11 1926

FILED
SEP 7 1926
WM. R. STANSBURY
CLERK

No. [redacted] 97.

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOSEPHINE STIPCICH,
Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITION FOR CERTIORARI OR RULE TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT. UNDER SUBDIVISION 3. RULE, 34, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

G.C. FULTON, Astoria, Oregon, Attorney for Petitioner.
WOOD, MONTAGUE & MATTHEISSEN, Portland, Oregon, Attorneys for Respondent.

Filed this ..... day of A.D.1926

.....
Clerk

IN THE
SUPREME COURT
OF THE
UNITED STATES

No. 533

OCTOBER TERM, A. D. 1926

JOSEPHINE STIPCICH,
Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Josephine Stipcich respectfully shows to this Honorable Court as follows:

That on March 26, 1924, the Metropolitan Life Insurance Company executed and delivered in Oregon to Anton Stipcich, a citizen of Oregon, its life policy wherein it covenanted to pay to him in consideration of the faithful performance by him of the covenants and conditions therein contained, on his part to be done and performed, on March 24, 1944, if alive; if not, upon due proof of his death, at any time prior thereto, to his wife, Josephine Stipcich, petitioner herein, the sum of $4,000 less any indebtedness or unpaid premiums, etc.

Thereafter, and on April 8, 1924, said Anton Stipcich, as the result of a surgical operation, died.

On April 22, 1924, petitioner made due proof of such death, which was received by the insurance company, but payment of the policy was refused.

Petitioner brought this action to recover on such policy.

The action was brought in the Circuit Court of the State of Oregon, for Clatsop County, on January 19, 1925.

By timely proceedings, and upon grounds of diverse citizenship, the cause was properly removed to the United States District Court for the District of Oregon. The cause was tried to the court and a jury and the trial concluded July 28, 1925.

At the conclusion of taking of the testimony, and after each party had rested, at the request of counsel for defendant Metropolitan Life Insurance Company, the court instructed the jury to return a verdict in favor of such defendant, which was accordingly done, and judgment was on said date entered thereon, and the action dismissed.

Upon the pleadings and a bill of exceptions duly settled and allowed, the case was by writ of error taken to the Circuit Court of Appeals for the Ninth Circuit.

After full hearing had before said Circuit Court of Appeals, under the provisions of Selection 239 of the Judicial Code as amended by the Act of February 15, 1925, that court on July 17, 1925, made certificate to this Court, as follows:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPHINE STIPCICH,
Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,
Defendant in Error.

No. 4764

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, CERTIFYING A CERTAIN QUESTION OR PROPOSITION OF LAW TO THE SUPREME COURT OF THE UNITED STATES UNDER SECTION 239 OF THE JUDICIAL CODE.

Before GILBERT, HUNT, and RUDKIN, Circuit Judges.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"IT IS UNDERSTOOD AND AGREED:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

"2. That no agent, medical examiner, or any other person except the Officers of the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of Jan-

uary next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions: * * *

"(c). A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician

at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X-ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

"That if the witness were permitted to an-

swer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time Mr. Julien Cublentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the Doctors consulted by the insured at Portland, Oregon. The court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the court directed a verdict in favor of the defendant.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered

as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulations contained in the application for the insurance and more especially of the stipulation:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

WM. B. GILBERT,
WILLIAM H. HUNT,
FK. H. RUDKIN.
United States Circuit Judges.

The said certificate has been seasonably filed in this Court and the cause placed upon the docket of this Court, as No. 533 of the October term, 1926, and is now pending before this Court.

Petitioner now makes application to this Court for a writ of certiorari or rule of this Court accordingly as the practice of this Court may obtain in such regard, directing and requiring that the entire record in this case be sent up and certified to this Court, accordingly as provided by Section 239 of the Judicial Code as amended by the act of February 13, 1925, and Rule No. 34 of the revised rules of this Court so that this Court may consider and decide the whole matter in controversy as upon a writ of error or appeal.

That accompanying this petition is a duly certified copy of the entire record of this cave in said Circuit Court of Appeals for the Ninth Circuit, in-

cluding the proceeding had before such Court in this case, which certified copy is now on file with the Clerk of this Court, and is hereby referred to and made a part of this petition and application. The said certified copy of the entire record includes the bill of exceptions, shown on pages 72 to 126, both inclusive; also, the assignments of error that were filed by your petitioner, shown on pages 64 to 69, both inclusive, all of which is hereby referred to and made a part of this petition and application.

Petitioner is advised and believes, and accordingly alleges, that there are special reasons for requiring the entire record in this case to be certified to this Court, and for this Court to consider and decide the whole matter in controversy, pursuant to the provisions of Section 239 of the judiciary act as amended, and No. 34 of the revised rules of this Court.

GROUNDS AND GRAVAMEN OF AND FOR THIS PETITION AND APPLICATION.

(A) **The Pleadings.** In her complaint, which was in accordance with the usual form, and as to which no question is made, petitioner set forth a copy of the life policy sued upon. A copy of this policy is found at pages 8 to 39, both inclusive, of the certified copy of the record filed with petition, which is hereby, referred to and made a part of this petition.

This policy contains the following provisions found on page 28 of such certified copy of the record, namely:

> "That the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the company, **during the lifetime of the applicants.**"

This policy contains the further provision found on page 38 of the certified copy of the record, namely:

> "This policy shall not take effect unless and until the full premium has been actually paid in cash."

To this complaint the Metropolitan Life Insurance Company made answer, in which it admitted the payment of the premium on March 19, 1924, and issuance of the policy of date March 26, 1924. The defendant, however, made the contention, among others not material for any purpose, that between the date of the application of the insured, February 18, 1924, and the date of the issuance of the policy, the health condition of the insured had materially changed, materially increasing the risk assumed, which was not disclosed to it by the insured, and by it wholly unknown, otherwise it would not have issued the policy.

(B) The Trial of the Case, Announced Law of:

At the trial of the case, over the objections of petitioner, the defendant Metropolitan Life Insurance Company, produced evidence which tended to show that a change had taken place in the health condition of the insured occurring after his application and before the issuance of the policy,

and that no notice of such changed health condition had been received by an agent of the company in charge of a local office at Astoria, Oregon.

To meet this issue petitioner offered evidence that both she and the insured had seasonably and at and prior to the payment of the premium on the policy, namely, March 19, 1924, fully informed and given notice of the changed health condition of the insured, to an agent of the defendant, appointed by it pursuant to the laws of the State of Oregon, being Section 2426, Oregon Laws, hereinafter set forth, and the one who solicited the policy, and to whom the application was delivered, the premium paid, and who delivered to the insured the policy in question.

The trial court held, announced and determined the law of the case to be as follows:

PROPOSITION OF LAW NO. 1. That although both by the plain terms of the written policy, and the plain terms of the law of Oregon, it is stipulated that the policy contains all the terms of the contract of insurance between the insured and assured, and this policy clearly specifies 'That the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered by the company **during the life of the applicant**," and that "This policy shall not take effect unless or until the full premium has actually been paid in cash," nevertheless the court, added the further stipulation to the policy, "provided that at the delivery of the policy the applicant should be in good health," and upon this rule the trial court admit-

ted evidence showing the changed health condition of the insured occuring between the date of the application and delivery of the policy.

PROPOSITION OF LAW NO. II. The trial court further held, announced and determined that there was evidence produced at the trial, by the defendant, that a changed health condition had occurred to the insured, between the date of the application and delivery of the policy, and that it was the law of the case, that the burden of proof was upon the petitioner, to produce evidence showing that actual notice had been given the assured of such changed health conditions, prior to the delivery of the policy.

PROPOSITION OF LAW NO. III. The trial court, further held, announced and determined it to be the law of the case, that notice of such changed health condition, given to an agent of the insurance company, appointed under the laws of the State of Oregon, was not notice to the company. This question has been certified to and is now before this Court.

PROPOSITION OF LAW NO. IV. The trial court further announced, held and determined that the law of the case was against petitioner, and accordingly instructed the jury to return a verdict in favor of the Insurance Company.

The theory upon which this case was decided by the trial court is set forth in the opinion of his honor, R. S. Bean, trial judge, shown on pages 54 to 60, both inclusive, and pages 111 and 113 inclusive, certified copy of record.

It is an admitted fact in this case that the insured at the time of his application for and delivery to him of the life policy in question was a citizen and resident of Oregon. His application for the policy was made and delivered to Julien Coblentz, an Oregon agent of the assured in Oregon. The policy was delivered to the insured by the same agent to whom the premium was paid, all in Oregon.

The laws of Oregon in force at such times, relating to life insurance policies and life insurance companies, such as this one here, in so far as applicable herein, may be found in Title XXVI Oregon Laws, being part of Chapter 203, General Laws of Oregon, A.D. 1917, and read as follows:

> "**Section 6421. Life Insurance Companies Defined.** All corporations, associations, partnerships, or individuals, doing business in this state under any charter, compact, agreement, or statute of this or any other state, involving the payment of money or other things of value to families or representatives of policy or certificate holders, or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies and shall be subject to this act, except as otherwise provided in this act."

> "**Section 6422.** Such life insurance companies shall not make any such insurance, guarantee, contract, or pledge in this state, or to or with any resident or citizen thereof, which does not definitely state the amount of benefits payable, the manner of payment and the consideration therefor. When the actual

premium charged hereafter for an insurance by any life insurance company or association doing business in this state is less than the net premium for such insurance computed according to the table of mortality and rate of interest prescribed in this act, such company shall be charged as a separate liability with the value of an annuity, the amount of which shall equal the difference between such premiums, and the term of which in years shall equal the number of future annual premiums due on such insurance at the date of valuation. **No such life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract."**

"**Section 6425. Agents.** 1. AGENTS' LICENSES. Every life insurance company doing business in this state shall give written notice to the insurance commissioner of the name and residence of, and obtain from him a license for every person appointed by it to act as its agent within this state, which license shall state, in substance, that the company is authorized to do business in this state and that the person named therein is constituted an agent of the company for the transaction of business in this state. Such license, unless revoked by the commissioner for cause or canceled at the request of the company employing the holder thereof, shall continue in force until the first day of April next after its issuance, and must be renewed annually, in advance.

(2) AGENT TO FILE APPLICATION. On receipt of an application for, and before issuing such license, the commissioner shall satisfy himself that such person appointed as an agent is qualified for the business he proposes to transact and such person shall have filed the applicant's statement provided in

section 6333. No person may solicit, place or procure insurance as an agent or solicitor until he has been provided with a license as required herein. No such licensed agent shall compensate or offer to compensate in any manner, directly or indirectly, any person, other than a licensed agent, for procuring or in any manner helping to procure an application or applications for insurance.

(3) TRANSFER OF LICENSE. Any license so issued may be transferred by the insurance commissioner upon the proper application of the company obtaining same without the payment of further fees, and he shall revoke any agent's license upon the written request of any such company or for failure to comply with the provisions of this act.

(4) REVOCATION OF LICENSE. Cause for the revocation of the license of an agent may exist for violation of the insurance laws, or if it shall appear to the commissioner upon evidence submitted or due proof after ten days' notice that such agent has, knowingly, deceived or defrauded a policy-holder or person being solicited for insurance, or that such agent has after written demand failed or neglected to pay over to the company or its agent entitled thereto any premium or part thereof collected by him on any application for or on any policy of life insurance.

(5) AGENT MAY PLACE REJECTED RISK IN OTHER COMPANY. An agent licensed on request of any company doing business in this state shall be entitled to place excess or rejected risks in any other company doing business in this state by and with the knowledge and approval of his own company without additional or separate license."

"Section 6426. Standard Policy Form.

(1) STANDARD PROVISIONS REQUIRED. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions:

(c) A provision **that the policy shall constitute the entire contract between the parties,** and shall be incontestable not later than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6429. POLICY FORMS TO BE FILED WITH COMMISSIONER. A policy of life insurance shall not be issued or delivered in this state until the form of the same has been filed with the insurance commissioner nor if the insurance commissioner give written notice within thirty days of such filing to the company proposing to issue it showing wherein the form of such policy does not comply with the requirements of the laws of this state."

"**Section 6435.** Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

"**Section 6355.** Whenever any suit or action is brought in any courts of this state upon any policy of insurance of any kind or nature whatsoever, the plaintiff, in addition to the amount which he may recover, shall also be allowed and shall recover as part of said judgment such sum as the court or jury may adjudge to be reasonable as attorney's fees in said suit or action; provided, that settlement is not made within eight months from date proof of loss is filed with the company; provided, further, that if a tender be made by a defendant in any such suit or action and the plaintiff's recovery shall not exceed the amount thereof, then no sum shall be recoverable as attorney's fees. The terms of this act shall not apply to any suit or action started or begun prior to the passage of this act."

Upon this statement of the facts and record in this case, petitioner submits the following reasons why the entire record of the court below should be certified to this court pursuant to the provisions of Section 239 of the Judicial Code and Rule 34 of the Special Rules of this Court, so that this Court may consider and determine all legal questions in controversy in this case, namely:

FIRST: That the policy in question, by its plain terms, and also by the laws of Oregon, pro-

vides that it contains all of the terms, conditions and provisions relating to the contract of insurance.

That there is no provision of condition of the policy that required the insured to notify the Insurance Company of any change in his health condition occurring between the date of his application and delivery of the policy. That had the Insurance Company desired to have incorporated in such policy any such condition, it had the opportunity to insert it before delivery. Having failed to do this it can not be permitted to insert such a provision now. That the insertion of such a provision is violative of the plain terms of the wording of the policy, and the plain provisions of the laws of Oregon, and makes an entirely new contract between the parties, and one which in all probability the insured would not have accepted. That the true construction of the policy in question is to be determined by the statutory law of Oregon read with the policy, namely: Section 6422 and Section 6426, Oregon Laws, where it plainly appears to be the legislative intent to prohibit the defeat of a life policy, on the very grounds under consideration.

SECOND: That the Legislative Assembly of Oregon, by the provisions of said Sections 6422 and 6426, having specifically required that all the terms and conditions relating to the policy must be included therein, and that the policy shall contain the entire contract between the parties, it was error of the court to admit evidence of any change in the condition of the health of the insured, occuring after the date of his application and before the delivery to him of the policy, for that

by so doing the terms of the policy were changed, and a new provision favorable to the assured was inserted. A provision not within the contemplation of the insured at the time of the contract. On the contrary, by the plain terms of the policy, it became effective upon payment of the first premium and delivery of the policy, **at any time during the lifetime of the insured.** The writer of the policy was careful not to add the further provision, **"during the good health of the insured,"** but now wants the courts to add this stipulation for it. And the court below erroneously inserted this provision at the trial.

And it would seem that the Circuit Court of Appeals is in accord with such erroneous view.

THIRD: It is the contention of petitioner that the fact, if a fact, that there occurred a change in the health condition of the insured, as contended for, and that without notice of such change, the Insurance Company delivered the policy; that this constituted a defense, and the burden was upon it to sustain such defense. But the trial court announced it as the law of the case that the burden of proof that notice of such changed health condition was given the Insurance Company rested upon the petitioner, and having failed to sustain such burden, the jury was instructed to return a verdict for defendant.

FOURTH: That the trial court was in error in instructing the jury to return a verdict in favor of the defendant, for the reason that according to the evidence produced petitioner was entitled to have had the case submitted to and passed upon by the jury.

FIFTH: The decisions of the District Courts, and also of the Circuit Court of Appeals where the "Propositions of Law No. I and No. II" above mentioned, have come before such courts, are wholly at variance, and irreconcilable. The Supreme Court of Oregon has not considered either of these legal propositions. The attention of petitioner has not been called to any case in this court where either of these propositions have been considered. This case is now before the Court on the "Proposition of Law No. III," and it is the contention of petitioner that it is important to the judiciary, as well as to the bar, that these vexed propositions should be considered and finally determined by this court. Not only that, the propositions of law now desired to be certified to this court are germane to the question certified here by the lower court, and the petitioner should in justice have the opinion of this court on each of these legal propositions.

The other proposition presented by this appeal, namely: Whether the evidence offered by petitioner of notice to the statutory agent of the Insurance Company was competent upon the record, has duly certified to, and is now before this Court. For this reason no further mention is made here on this legal proposition.

WHEREFORE, your petitioner respectfully prays that writ of certiorari may be issued out of and under the seal of this Court, or such rule may be made and entered by this Court in accordance with the usual custom and practice of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding and di-

recting such court to certify and send to this Court the entire record in this cause in accordance with the provisions of Section 239 of the Judicial Code and Rule 34 of the Revised Rules of this Court, to the end that the whole matter in controversy may be considered and decided by this Court; and that your petitioner may have such other and further relief and remedy in the premises as this Court may deem appropriate and in conformity with the said provisions of the Judicial Code, and that the judgment of the District Court of the United States for the District of Oregon involved in this case be reversed.

JOSEPHINE STIPCICH,
Petitioner,

G.C. FULTON
Attorney for Petitioner

By G. C. FULTON
Her Attorney.

UNITED STATES OF AMERICA)
) ss.
District of Oregon)

G. C. Fulton being duly sworn, says: That he is attorney for the petitioner, and that the petitioner is now without the State of Oregon, and for that reason unable to make this verification.

That I have personal knowledge of the matters and things set forth in the foregoing petition and application, having been attorney for the petitioner at the trial of the above entitled case. That I have personally prepared the foregoing petition and application, and know the contents thereof, and the same is true as I verily believe.

G. C. FULTON.

Subscribed and sworn to before me this 28th day of August, A. D. 1926.

A. C. FULTON
Notary Public for Oregon

My commission expires

I hereby certify that I have examined the foregoing petition and application, and in my opinion the petition is well founded and the case is one which the prayer of the petitioner should be granted.

G. C. FULTON
Attorney for Petitioner

MEMORANDA

This is not intended to be a brief accompanying the petition and application, allowed by the rules of this Court, the object being to show to this Court the rule adopted and decided by the trial court, and apparently approved by the Circuit Court of Appeals, is wholly at variance, and in total disregard to the prior decisions of this court, and prior decisions of the court below.

In support of this contention we cite:

Mutual Benefit, etc., Co., v. Higginbotham, 95 U. S. 380, 24 L. Ed. 499.

New York Life Ins. Co. v. Moats, 207 Fed. 493.

Respectfully submitted,

G. C. FULTON,
Attorney for Petitioner.

C

J

M

S
S

(U

G.

W

Fi

FILED
JAN 24 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 97

JOSEPHINE STIPCICH,
Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Defendant and Respondent.

BRIEF FOR PLAINTIFF AND PETITIONER JOSEPHINE STIPCICH UPON THE QUESTION AND PROPOSITION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

(UNDER SUBDIVISION 3, RULE 34, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.)

G. C. FULTON, Astoria, Oregon, Attorney for Plaintiff and Petitioner.

WOOD, MONTAGUE & MATTHIESSEN, Portland, Oregon, Attorneys for Defendant and Respondent.

Filed this.....day of.....A. D. 1927

.....
Clerk.

SUBJECT INDEX

	Page
Agency of Julien Coblentz	19
Argument	8
Conclusion	29
Consideration for the Policy	24
Issues Presented by the Answer	16
Policy Contains all the Terms of the Contract between the Parties	15
Statutory Laws of Oregon	8
Stipulation in the Application	27

CASE INDEX

Mutual Benefit Life Ins. Co. vs. Higginbotham 95 U. S. 380, 24 L. ed. 499	18
Section 6421, Oregon Laws	8
Section 6422, Oregon Laws	9
Section 6425, Oregon Laws	10
Section 6333, Oregon Laws	11
Section 6426, Oregon Laws	11
Section 6429, Oregon Laws	12
Section 6435, Oregon Laws	13

No. 533

Supreme Court of the United States

OCTOBER TERM, 1926

JOSEPHINE STIPCICH,

Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant and Respondent.

BRIEF FOR PLAINTIFF AND PETITIONER JOSEPHINE STIPCICH UPON THE QUESTION AND PROPOSITION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

(UNDER SUBDIVISION 3, RULE 34, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES)

The United States Circuit Court of Appeals for the Ninth Circuit has certified to this Court the following question and proposition of law concerning which it desires instruction for the proper decision of this case, which is now pending before it, on Writ of Error to the United States District Court for Oregon, namely:

"United States Circuit Court of Appeals for the Ninth Circuit.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant in Error

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CERTIFYING A CERTAIN QUESTION OR PROPOSITION OF LAW TO THE SUPREME COURT OF THE UNITED STATES UNDER SECTION 239 OF THE JUDICIAL CODE.

Before GILBERT, HUNT and RUDKIN, Circuit Judges.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

'IT IS UNDERSTOOD AND AGREED

'1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

'2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

'3. That any statement made to or by, or any knowledge on the part of, any agent medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant.'

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon, provide:

> 'Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions:
>
> * * *
>
> '(c) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued.'
>
> 'Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in conse-

quence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever.'

In his application for insurance, the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X-ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would

materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

> "That if the witness were permitted to answer the questions propounded and such questions as would properly bring this matter out, she would testify as follows: That after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time Mr. Julien Coblentz was agent for the defendant company."

That Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the doctors consulted by the insured at Portland, Oregon. The Court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the Court directed a verdict in favor of the defendant.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulation contained in the application for the insurance and more especially of the stipulation:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or B of this application."

WM B GILBERT,
WILLIAM H HUNT,
FRANK H RUDKIN,
United States Circuit Judges."

ARGUMENT

To properly answer this question, at least as we understand it, this Court should be fully advised.

FIRST: As to the statutory laws of Oregon pertaining to and governing life insurance companies and policies of insurance obtained and issued by such companies under such statutes existing at the issuance of the life policy in question.

SECOND: The provisions of the policy issued on the life of Anton Stipcich applicable to the question certified to this Court.

THIRD: The issues presented by the pleadings, and evidence produced by defendant, to which the offered but rejected testimony of Josephine Stipcich was responsive.

FOURTH: The law of the case.

I.

THE STATUTORY LAWS OF OREGON

The statutory laws of Oregon relating to life insurance companies and life insurance is found in Volume 2, Oregon Laws, under Title XXXVI, Chapter I. Copies of the particular statutory provisions which it is believed applicable to and necessary for the solution of the question propounded, and which were in force at the time of the application for and issuance of the life policy in question, are as follows:

"Sec. 6421. LIFE INSURANCE COMPANIES DEFINED. All corporations, associations, partnerships, or individuals, doing

business in this state under any charter, compact, agreement, or statute of this or any other state, involving the payment of money or other things of value to families or representatives of policy or certificate holders, or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies and shall be subject to this act, except as otherwise provided in this act."

"Sec. 6422. LIFE INSURANCE CONTRACTS DEFINED. Such life insurance companies shall not make any such insurance, guarantee, contract or pledge in this state, or to or with any resident or citizen thereof, which does not definitely state the amount of benefits payable, the manner of payment and the consideration therefor. When the actual premium charged hereafter for an insurance by any life insurance company or association doing business in this state is less than the net premium for such insurance computed according to the table of mortality and rate of interest prescribed in this act, such company shall be charged as a separate liability with the value of an annuity, the amount of which shall equal the difference between such premiums, and the term of which in years shall equal the number of future annual premiums due on such insurance at the date of valuation. No such life insurance contract or policy may be issued which does not

include all conditions and provisions relating to the contract."

"Sec. 6425. AGENTS. (1) AGENTS' LICENSES. Every life insurance company doing business in this state shall give written notice to the insurance commissioner of the name and residence of, and obtain from him a license for every person appointed by it to act as its agent within this state, which license shall state, in substance, that the company is authorized to do business in this state and that the person named therein is constituted an agent of the company for the transaction of business in this state. Such license, unless revoked by the commissioner for cause or cancelled at the request of the company employing the holder thereof, shall continue in force until the first day of April next after its issuance, and must be renewed annually, in advance.

(2) AGENTS TO FILE APPLICATION. On receipt of an application for, and before issuing such license, the commissioner shall satisfy himself that such person appointed as an agent is qualified for the business he proposes to transact and such person shall have filed the applicant's statement provided in Section 6424. No person may solicit, place or procure insurance as an agent or solicitor until he has been provided with a license as required herein. No such licensed agent shall compensate or offer to compensate in any manner, directly or indirectly, any person, other than a licensed agent, for procuring or in any manner helping to procure an application or applications for insurance.

"Sec. 6333 * * * (5) CONTENTS OF APPLICATION FOR LICENSE. No license shall be issued to any applicant for an agent's license until such applicant shall have first made and filed in the commissioner's office an application therefor upon a form to be prescribed and furnished by the commissioner, which must show the applicant's name, business and residence address, name of company or companies to be represented, present occupation, occupation for last twelve months, portion of time to be devoted to the work, previous insurance experience, the name of employers during five years next preceding, and such other information as the commissioner may require. The statements and answers made in the application shall be warranted by the applicant and shall have the same force and effect as if such statements and answers had been made by the applicant as a sworn witness testifying to matters material to the issue in an action duly pending in a court of competent jurisdiction in this state. Such application must be approved by the company to be so represented and by the insurance commissioner."

"Sec. 6426. STANDARD POLICY FORM. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of

this state, unless the same shall contain in substance the following provisions:

(a) **PREMIUMS PAYABLE.** A provision that all premiums after the first shall be payable in advance, either at the home office of the company or to an agent of the company, upon delivery of a receipt signed by one or more of the officers who shall be designated in the policy. * * *

(c) **POLICY AND APPLICATION ARE CONTRACT.** A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued. * * * "

"Sec. 6429. **POLICY FORMS TO BE FILED WITH COMMISSIONER.** A policy of life insurance shall not be issued or delivered in this state until the form of the same has been filed with the insurance commissioner, nor if the insurance commissioner give written notice within thirty days of such filing, to the company proposing to issue it showing where-

in the form of such policy does not comply with the requirements of the laws of this state."

"Sec. 6435. **WHEN SOLICITOR AGENT OF COMPANY.** Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

II.

A full copy of the life policy in question, including a copy of the application of the insured, which was attached to and formed a part of the policy, is to be found in the printed Transcript of Record filed herein, beginning on page 8 thereof. The parts which it is believed applicable to the proper solution of the question certified are the following:

Page 8, Trans. of Rec.

"**METROPOLITAN LIFE INSURANCE COMPANY** * * * in **CONSIDERATION** of the application for this policy, copy of which application is attached hereto and made a part hereof, and of the payment of the annual premium of Two Hundred and Twelve Dollars and Forty-eight Cents, and of the payment of a like amount upon each 26th day of March hereafter, until twenty full years' premiums shall have been paid or until the prior death of the insured,

Promises to pay at the home office of the company in the city of New York to

ANTON STIPCICH
(herein called the Insured)

on the 26th day of March, 1944, if the insured be then living, or upon receipt at said home office of due proof of the prior death of the insured, to Josephine Stipcich, wife of the insured, beneficiary, Four Thousand Dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy, properly receipted."

NOTE: It is there clearly and positively stated that the sole and only consideration for the issuance of this contract by the company is—

(1) The written application of the insured; and

(2) The payment by the insured to it of the specified premiums.

There is no provision to be found in the policy making it a condition that the insured should be in good health at the time of delivery. On the contrary, it is plainly stated that the company relied solely upon the written application of the insured as to his health condition. Furthermore, no provision as to notice of anything or matter to the company, excepting of the death of the insured is to be found in this policy.

On page 28, Transcript of Record, is found the following stipulation incorporated in the application of

the insured, which is made a part of the policy, namely:

> "IT IS UNDERSTOOD AND AGREED:
>
> 1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued. * * *
>
> 4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

Nothing here is found requiring the insured to be in good health at the delivery to him of the life policy, or requiring notice of any change in the insured's health condition. All that is required of the insured is, that he shall be alive at the delivery of the policy. As to his health condition, the assured assumes that risk.

POLICY CONTAINS ALL THE TERMS OF THE CONTRACT BETWEEN THE PARTIES

On page 12 of the Transcript of Record is found the further provision of this policy, namely:

> "3. INCONTESTABILITY. This Policy (and the application therefor) constitutes the entire contract between the parties, and except for non-payment of premiums, shall be incon-

testable after two years from the date of its issue.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid this Policy or be used in defense of a claim hereunder, unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued."

See also Sec. 6425, Sub. (c) O. L.

Nothing here is required of the insured to give notice to the assured of any change in his physical health occurring after the application and before delivery of the policy. Nothing which can be construed into any agreement that the or any of the statements of the applicant shall be held to be continuing statements until delivery of the policy. On the contrary, it is plainly stipulated to the contrary. Not only that, but it clearly provides, that no representation or statement other than those included in the application can be employed to defeat the policy. Such, too, is the law of Oregon.

Such are, as we understand it, the main provisions of the contract of insurance applicable to the solution of the question propounded to this Court.

III

ISSUES PRESENTED BY THE ANSWER

For the purpose of determining the materiality of the offered testimony, it is of importance to consider the special answer of the defendant.

As a special defense to the recovery on the policy, the defendant averred—

> (1) That after his application for the insurance, and prior to the actual delivery to him of the policy, a material change took place in the insured's health, which materially increased the risk intended to be assumed by defendant in its policy.
>
> (2) This change of health, the insured purposely and fraudulently concealed from defendant.
>
> (3) That it had no knowledge of such changed conditions, and had no means of knowledge thereof.
>
> (4) That had the assured known of such change, it would not have issued the policy.

It was in response to such issues and evidence produced by the defendant in support thereof that the plaintiff offered to produce the evidence rejected, as set forth in the question propounded to this Court.

The plaintiff seasonably challenged the legal sufficiency of this defense, but it was held good by the trial Court, and over her objection, defendant produced evidence which tended to support such defense. The theory upon which this special defense was sustained, and evidence admitted in support thereof, was this, namely: That despite the plain wording of the policy, and the statutory provisions of Oregon above quoted, and, as we view it,

in direct violation thereof, there is an implied obligation construed into this policy, on the part of the insured to have notified the assured of any material change in his health condition occurring between the application and the delivery of the policy, or to express it otherwise, that, although not so expressed in the policy, there is an implied warranty on the part of the insured that his health condition would continue and be the same as represented in the application until the policy was delivered. If any such change did occur, and no notice thereof was given the assured, the policy could be avoided on such ground.

To meet the issue produced by this special plea, and the evidence produced by defendant in support thereof, plaintiff in rebuttal, at all times relying upon the case of MUTUAL BENEFIT LIFE INS. CO. vs. HIGGINBOTHAM, 95 U. S. 380, 24 L. ed. 499, offered evidence to the effect that immediately prior to the payment of the premium and delivery of the policy, the insured fully and truthfully informed the defendant, through its agent Julien Coblentz, of the changed condition of his health, as disclosed by the proof produced on behalf of defendant. This evidence was rejected upon the theory that such notice to Coblentz, although intended to be to the defendant, and was given for such purpose, was not notice to the defendant, and this is the ultimate question to be decided by this Court in this case.

It is, therefore, important that this Court should determine the power and authority of this agent.

AGENCY OF JULIEN COBLENTZ

There can be no controversy as to the fact or character of the agency of Julien Coblentz for defendant. The record shows—

(1) He was the duly licensed agent of defendant under the laws of Oregon, Sec. 6425, O. L.

(2) He was the agent of defendant who solicited and procured the application of Anton Stipcich for the policy in question. See Sec. 6435, O. L.

(3) He was the agent of defendant to whom the insured paid the first full premium.

(4) He was the agent who delivered the policy to the insured.

(5) Mr. Julien Coblentz was the only agent of defendant who actually signed the official voucher acknowledging receipt of the first full premium on the policy. (See page 38, Tr. of Rec.)

All business transactions had between the insured and the defendant from the application to and inclusive of the delivery to him of his policy were done exclusively through Julien Coblentz. As we have mentioned, the statutory laws of Oregon at that time provided that any person who shall solicit and procure an application for life insurance shall, **in all matters** relating to such application and the policy issued in consequence thereof, be regarded as the agent of the insurer, not a special agent with limited powers, but a general agent relating to all

such matters. (Sec. 6435, O. L.). He was the licensed agent of defendant under the laws of Oregon. (Sec. 6425, O. L.), which further provided, that every life insurance company doing business in such state must give notice to the Insurance Commissioner of the name and residence of, and obtain a license for, every person appointed by it to act as agent for it within the state, which license shall state in substance that the person named therein **is constituted an agent of the company for the transaction of business in the state**, not a special or an agent of limited authority, but an agent of the company to transact business in the state. What business may we inquire? There is but one answer, namely, to procure applications for insurance, collect the first premiums and deliver the policies. All these things Julien Coblentz did for the insured, and let it be known, that all the matters under investigation here, and the evidence relating thereto, which was rejected, had reference solely to the period beginning with the application and ending with the delivery of the policy. The insured knew no other agent or representative of defendant. The insured found Julien Coblentz's signature on the first official receipt delivered to him as evidence of payment of the first premium (pg. 38, Transcript of Record), and it was to Julien Coblentz that he and his wife, the beneficiary named in his life policy, fully, frankly, honestly and in all good faith, long after the application for the policy was signed and delivered to defendant, and immediately prior to the payment of the first premium and delivery of the policy, communicated to defendant, through Coblentz, the fact of his physical condition complained of by defendant. The insured and his beneficiary

were wholly frank and honest with defendant. No fraud, deceit or misrepresentation can be charged against either. They did all that either honestly believed they could or should do. They put defendant in full possession of the health condition of the applicant. What other information the insured gave defendant, if any, or through what channel such information was conveyed, can never be established in the courts of this land. Such information, if any, was lost at the death of the insured. Mutual Benefit Life Ins. Co. vs. Higginbotham, supra. If notice to defendant of the changed condition of the health condition of the insured complained of was an obligation constituting a warranty on the part of the insured, surely notice to it, through Coblentz, was sufficient. If not, to whom, and by what manner or method should such notice be given? There is no provision of the policy requiring such notice, nor is there any provision providing the method or manner of such notice, or to whom it should be given. Ample and specific provision is made in the policy as to notice of and proof of death of the insured. Why no provision for notice of changed condition of health? The policy specifically provides, likewise the Laws of Oregon, that the policy contains all the terms of the contract between the parties. In fact, Section 6422, Oregon Laws, provides that "no such life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract." Yet no provision can be found in the policy, either requiring any such notice, or providing to whom such notice may be given, or the sufficiency or method or manner of such notice. Under these stipulations and statutory provisions, the insured hunted

and found Julien Coblentz, who solicited and procured from him the application for this policy, and delivered to him the policy, and to whom he subsequently paid the premiums, and truthfully informed him of his changed physical condition, to which the special defense and evidence produced by defendant referred.

Our contention is, that if this contractual obligation shall be construed into this policy of insurance, this notice given Coblentz was surely sufficient, and that defendant cannot, in the absence of any stipulation in the policy, interpose its contention that the notice should have been given to some other agent of defendant, whose home office was without the State of Oregon.

That whilst, as a matter of fact, we contend that failure to give notice of any changed condition of the health of the insured can not be used or employed to defeat the claim, nevertheless, it is manifest that the cause was tried in the trial Court, over the objection of plaintiff, upon the theory that the notice contended for by the defendant must have been given defendant. It is not now available to defendant to contend that the evidence offered and rejected was immaterial.

As we understand it, such is the rule in Mutual Benefit Life Ins. Co. vs. Higginbotham, 95 U. S. 380, *supra*.

IV.

It is our contention that the construction into the policy of insurance of a provision to the effect that it was the duty of the insured to notify the company

of any material change in his health condition which increased the risk to be assumed by the company, after he had delivered his application and before delivery of the policy, must be held to be contractual, and in plain violation of the stipulation in the policy, and the statutory provisions of the Oregon Laws. Section 6422 and 6426, Oregon Laws, supra. The policy contains no such stipulation or obligation. The only provisions of the policy in anywise relating to such construction are—

(a) Payment in full of the first premium.

(b) Delivery of policy during the life time of the insured.

All these provisions were fully performed.

We appreciate the fact that although the legal question as to whether this Court will construe into this policy, in the face of the plain terms of the policy and the statutory provisions of this state prohibiting it, a stipulation requiring the insured to give the insurer such notice of any such changed conditions of his health, is not in so many words certified to this Court, nevertheless, it is a question that must be considered and determined by this Court before an answer can be properly made to the question submitted, for it is clear that if such notice must be given, there must be an additional contract provision added to the policy providing therefor, and also providing **to whom such notice must be given**, and the further provision whether verbal or in writing. None of these provisions are in the policy. In order to get them there, they must of necessity be construed into this Policy by this Court. In order to do

this, this Court must of necessity give this question its full consideration. There seems no other course open.

V.

THE CONSIDERATION FOR THE POLICY

The assured prepared this contract. It is therein specifically agreed that the sole and only consideration for the contract moving to the assured is, (pg. 8, Transcript of Record) (1) the application for the policy, and (2) payment of the first and thereafter annual premiums, and (3) (pg. 38, Transcript of Record), that the policy shall become in full force and effect upon the application being received, approved and policy issued and delivered, and the full first premium stipulated in the policy has actually been paid and accepted by the company, **during the life time of the applicant,** and that all of the conditions and provisions relating to the contract of insurance are included in the policy, and that the policy itself constitutes the entire contract between the parties.

The application for the policy was duly received and accepted by defendant. The first premium was paid in full to and received by the assured. The policy was issued and delivered to and received by the applicant during his life time. The insured, in all honesty and good faith, performed all the terms and conditions of the policy. Not only that, he did more than he was required to do. Before the policy was issued to him and before he had paid the first premium, he discovered that he probably was suffering from a recurring ulcer of the stomach, which probably required a surgical operation. This infor-

mation he promptly gave the assured before he paid his premium. With all this knowledge, the assured accepted the premium, issued to the insured the policy. Thereafter, the surgical operation was deemed advisable and performed, from which the insured died. His widow, the beneficiary named in the policy, brought this action on the policy. But her claim was denied, solely by reason of a contractual obligation construed into the policy, in plain violation of the express terms thereof and of the laws of Oregon, a policy provision that the statements made by the insured in his application, of date February 17, 1924, were continuing warranties up to the delivery of the policy, March 26th following. Such is not the rule of this Court. In fact, the rule is plainly to the contrary. We refer to the case of Mutual Benefit Life Ins. Co. vs. Higginbotham, 95 U. S. 380, 24 L. ed. 499, supra, where this Court, after a full consideration of the law of the case, held, that a statement by the insured made October 1st for a renewal of his policy, should not be held a continuing representation up to October 14th, the date of the delivery of the certificate of renewal. This Court there held that had the insurance company desired further information as to the condition of the insured's health, at date of delivery of the certificate of renewal, it should have then made it. Failing so to do, it was estopped from denying liability, because a material change had taken place in the physical health of the insured. We quote from the Court's opinion.

> "Had it been otherwise, we cannot conceive how the sagacious business men who control this Company would have assented to the de-

livery of the policy without inquiry as to the intermediate time. More than three months elapsed before Day's death, monthly returns being made by the agent; and the Company must have known and assented to the delivery of the renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after October 1st. The jury might account for it on the theory that the whole contract was intended to be and was as of October first, and that it spoke from that date.

There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The Company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods as it thought proper. It was not for him to advise the Company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the Company chose to give it, found upon examination that it covered the whole period from the July preceding. He lived in the same town with the agent, and received no suggestion from him that anything further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise."

It would seem that the doctrine of the above case is decisive of this question. We rely upon it, and shall cite no further authority.

STIPULATION IN THE APPLICATION

The Court below seemed to have been impressed with the idea that the following stipulation in the application, namely:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or B of this application."

should be construed to apply to statements made or knowledge obtained by the assured, after the delivery to it of such application. In this, we submit such Court is clearly in error. The application was signed and delivered to the company on February 17, 1924. The information to the Company of the changed condition of the insured's health was given the Company on March 24th or 25th following. It was impossible for the insured to have included this information in the application or in Parts A or B thereof.

Therefore, if this stipulation has any such application, the fact of actual notice to the company, the character of such notice, or to whom such notice was given, accompanied by even the most formal written aknowledgement of such notice by the company itself, would be a wholly immaterial matter, and unavailable to the insured, unless such state-

ment, or acknowledgement of such notice, should have been incorporated in such application, and in either Part A or B thereof,—a construction which we feel justified in saying this Court will not entertain at least long hesitate in so doing.

This stipulation should be construed with the following other stipulations in the policy, namely: (pg. 12, Trans. of Rec.)

> "3. INCONTESTABILITY.—This policy (and the application therefor) constitutes the entire contract between the parties, and except for non-payment of premiums, shall be incontestable after two years from the date of its issue.
>
> All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this Policy or be used in defense of a claim hereunder, unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued."

Also, with the laws of Oregon in this regard, particularly Section 6426, O. L. above quoted.

Plainly and clearly, it is stipulated in the policy, that no statement made by the assured can be used in defense of a claim under the policy, unless contained in the written application. How can it be held, in the face of these stipulations, that a claim under the policy can be defeated and the policy avoided, by a showing to the effect that the insured

remained silent, when he should have spoken, yet had he spoken, his statement could not be used to avoid the policy?

This stipulation must be taken and construed as a whole. It cannot be separated into distinct parts. It deals with but one subject, and limits the statements of the insured, notice by it received, knowledge by it obtained, and all information pertaining to the life history, and physical condition of the insured to statements made and information given and found exclusively in Parts A and B of the application, and its policy was based exclusively thereon.

If it does have any application, it must, as we have pointed out, be construed with Section 3 of the policy above quoted. Such being true, the failure to furnish the information complained of, not being in the application, or in Parts A or B, and no stipulation in there found requiring such information, the Company, by its own stipulation, cannot use or employ such failure as a defense to this action, or to avoid the policy.

As we construe this stipulation, it has naught to do with matters occurring subsequent to the application.

CONCLUSION.

It is our contention—

(1) That, under the plain provisions of the statutory laws of Oregon in force at the time of the transactions involved in this action, and the plain terms of the contract itself, the in-

sured was not obligated to give notice to the Company of any change in his health condition occurring after the delivery of his application and before delivery to him of the policy. That the Company, by the plain terms of the contract, reserved the right to make full investigation and inform itself fully as to the health condition of the applicant at and prior to the delivery of the policy. Mutual Benefit Life Ins. Co. v. Higginbotham, supra.

(2) That the trial court was in error in admitting the evidence produced by the defendant, tending to show a change had occurred in the health of the insured after the application and before the delivery of the policy, etc. That, nevertheless, such evidence being introduced upon the theory of defendant's case that the evidence offered and rejected became then material—at least, defendant cannot now contend that because under the policy the defense pleaded constituted no defense, and no evidence produced in support thereof, was immaterial, that the offered and rejected testimony became immaterial.

(3) Yet if it be held that the contract of insurance obligated the insured to give defendant such notice, that under the plain wording of the provisions of the statutory law of Oregon Sections 6425 and 6435, Oregon Laws, quoted supra Julien Coblentz was the general agent of defendant in all his dealings with the insured, and in all transactions occurring from the application for the policy up to and including

the delivery of the policy. Such an interpretation will be fair to both parties, if for no other reason than that no provision is made in the policy as to the method or manner of giving such notice, or to whom such notice should be given, and the further fact that such notice to agent Julien Coblentz was shown by the evidence to be given in all honesty and good faith.

Under such circumstances, all that should be required of the insured is that he should act in good faith and as an ordinary man should under like circumstances, which is always a question for the jury.

(4) That conceding for the purposes of this case that the statements made in the application shall be held to be continuing statements up to the completion of the contract, the stipulation quoted from the application for the insurance in the question propounded has no application, but applies solely to the application, and not to matters subsequent thereto. Hence, notice to Julien Coblentz was notice to the assured, and the answer to the question propounded should be Yes.

(5) That it is the law of this case that the answer to the question propounded should be Yes.

Respectfully submitted,

G. C. FULTON

Attorney for Petitioner Josephine Stipcich.

Office Supreme Court, U. S.
FILED
OCT 26 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 97

JOSEPHINE STIPCICH,

Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant and Respondent.

REPLY BRIEF ON BEHALF OF PLAINTIFF

G. C. FULTON, Astoria, Oregon,
Long, Chamberlain & Nyce, Washington, D. C.,
Attorneys for Plaintiff and Petitioner.

F. ELDRED BOLAND and SAMUEL KNIGHT,
Balfour Bldg., San Francisco, California,
Attorneys for Defendant and Respondent.

Filed this.....day of.....A. D. 1927.

.....

Clerk.

TABLE OF AUTHORITIES CITED.

Page

Askey v New York Life Ins. Co., Wash. 1918, F. L. R. A. 267 7

1 Cooley, Briefs on the Law of Insurance, pg. 690. 3

Ley v Metropolitan Life Insurance Co., 128 Ia. 203, 94 N. W. 508 6

National Fire Ins. Co. v Wanberg, 260 U. S. 71. 67 L. ed. 136 3

Union Trust Co., v Grosman, 245 U. S. 212, 62 L. ed. 368. 3

CASES REFERRED TO IN ORAL ARGUMENT.

1. American Life Insurance Company vs. Mahone, 88 U. S. 152.

2. Cable vs. U. S. Life Insurance Company, 111 Fed. 19.

3. Continental Life Insurance Company vs. Chamberlain, 132 U. S. 304.

4. John Hancock Mutual Life Insurance Company vs. Warren 181 U. S. 73.

5. Insurance Company vs. Wolff, 95 U. S. 326.

6. Mutual Life Insurance Company vs. Milton-Green, 241 U. S. 613.

7. New York Life Insurance Company vs. Fletcher, 117 U. S 519.

8. New York Life Insurance Company vs. Cravens, 178 U. S 389.

9. New York Life Insurance Company vs. Russell, 77 Fed. 94 (8th C. C. A.)

10. Northwestern Life Insurance Company vs. Riggs, 203 U. S. 243.

11. Union Mutual Life Insurance Company of Maine vs. Wilkinson, 80 U. S. 222.

12. Whitfield vs. Aetna Life Insurance Company, 205 U. S. 489.

Supreme Court of the United States

OCTOBER TERM, 1926

No. 533

JOSEPHINE STIPCICH,

Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant and Respondent.

REPLY BRIEF ON BEHALF OF PLAINTIFF

Counsel for defendant suggest four propositions in their brief in this case. We will take these propositions up in the order set forth in their brief.

FIRST

It is first contended that the authorities are unanimous that any change in the physical condition of the appellant pending the consideration of his application by the insurer and prior to the actual consummation of the contract by delivery of the policy and payment of the premium must be brought to the attention of the company. This proposition we deny.

(a) In the very nature of things, it cannot be true. It surely cannot be soberly denied that the insurer and insured may, by stipulation, provide when the policy shall take effect, or that representations and statements are to be considered only as representations, not warranties. It surely cannot be denied that the insured and insurer can by stipulation provide that the only condition required for the enforcement of the policy is the payment of the premium at any time during the life of the insured. It is, doubtless, true that in construing the wording of a special policy, some of the Courts have added a stipulation to the effect that any change occurring in the health of the insured between the application and the delivery of the policy must be brought to the attention of the insurer, but no case can be found where it is held, under statutory provisions such as are in force in Oregon, and under a writing such as we have here, that any stipulation not in the writing can be added to it, or that any written term or stipulation can be judicially eliminated therefrom. Every policy must be construed according to the express written terms thereof.

In this case, the defendant came into the State of Oregon in competition with many other life insurance companies. It made the terms of its policy as attractive as possible. It accepted the laws of such state. Its policy complied with the statutory provisions, which provide that the written terms of the policy are all the terms and stipulations thereof, and that nothing can be taken therefrom or added thereto.

(b) THE CONTRACT OF INSURANCE AND THE LAWS OF OREGON.

We insist that the question for solution presented by the Court of Appeals must be determined wholly from the written terms of the contract of insurance, construed with the insurance laws of Oregon.

1 Cooley, Briefs on the Law of Insurance, pg. 690

National Fire Ins. Co. v. Wanberg, 260 U. S. 71, 67 L. ed. 136.

Union Trust Co. v. Grosman, 245 U. S. 212, 62 L. ed. 368.

THE LAWS OF OREGON

Section 6422, Oregon Laws, pp 9, 10, plaintiff's brief, provides, "no such life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract."

NOTE: No reference is made to this statutory provision in the certificate from the court below. Doubtless, it was overlooked, but it should be considered, and is one of the important matters connected with the construction of the policy in question.

Section 6426, Oregon Laws, pg. 12, plaintiff's brief, provides, "that every policy of life insurance shall contain a provision that the policy shall constitute the entire contract between the parties; that all statements made by the insured

shall, in the absence of fraud, be deemed representations, and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy, unless contained in a written application, and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

There is a provision in the policy containing the same wording as the above mentioned statutory provision. The policy contains the further stipulation, namely: (pp 8, 9, Transcript of Record)

(1) The application for the policy, which is attached to and made a part of the contract of insurance, and, of course, should be read with all the other terms and conditions of the policy.

(2) The policy contains the further provision that the company shall incur no liability under the application until it has been received, approved and a policy issued and delivered, the **first premium stipulated in the policy actually paid to and accepted by the insurer, during the life of the applicant.**

There is no stipulation that the applicant should be in good health when the conditions precedent above cited had been complied with. There is no stipulation that the representations made in the application were continuing warranties. Nothing at all. All that the insurer required was the payment of the premium, and the delivery of the policy to the insured **during his life time.**

There is no stipulation requiring the insured to notify the insurer of any changed condition of his health occurring between the date of the application

for the policy and its actual delivery. If the contract of insurance as written "constituted the entire contract between the insurer and insured," and "includes all the conditions and provisions relating to the contract," how can it be held that this Court can write into this contract a stipulation which the insurer refused to write into it itself, namely, **that in addition to being alive at the delivery to him of the policy "the insured must also be in good health," or, "that if any change occurred in his health which should materially increase the risk assumed by the insurer under the policy, he should notify the insurer of such change, otherwise the policy should be ineffective," and these added conditions shall constitute warranties, not representations?**

It is our understanding that it was to prevent such court amendments that the legislature of Oregon enacted the statutory provisions above set forth. Surely, the insured had the right to assume that had the insurer desired it, such stipulations would have been written into the policy before its delivery, so that he could understand what the terms and conditions were. He had also the undoubted right to assume that such stipulations not having been written into the contract, neither formed any part thereof.

Section 713, Oregon Laws, reads as follows:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in

interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

As we have heretofore noted, it is stipulated in the contract of insurance that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no statement can be urged as a defense to a claim under the policy, unless contained in the written application, etc.

It is fundamental that to defeat a life insurance policy upon the ground of false representations, the burden is upon the insurer to prove, (1) that the representation by it claimed to be false was in fact false, and further (2) that it was knowingly made with intent to deceive, and (3) that the insurer was thereby deceived, and issued the policy in reliance upon the truth of such representation.

Ley v. Metropolitan Life Ins. Co., 128 Ia. 203, 94 N. W. 568.

Askey v. New York Life Ins. Co., Wash., 1918 F. L. R. A. 267.

Had the defense to this action been that the insured had made a false statement in his application, it would have been incumbent upon the defendant to have proven, not only its falsity, but that it was knowingly so made with intent to deceive the insurer, and that the insurer was thereby deceived and issued the policy in reliance thereon. Of course, there was no such proof offered at the trial in the court below.

But, now the wrong of the thing is, that it is contended that the mere proof of the fact that between the signing and delivery of the application and the delivery of the policy, a change in the health of the insured is sufficient to absolutely defeat the policy. Not only that, but the contention is further made that this proof cannot be met with evidence on behalf of the plaintiff of absolute good faith on the part of the insured, namely, that the true state of the health of the insured was fully and honestly stated to the insurer at and prior to the delivery of the policy.

Why is it that all representations and statements of the insured contained in his written application are only representations whilst this proposed added stipulation is a warranty?

Had it been included in the written application, it could be held to be but a representation. At what period does it blossom into a warranty? The only answer is, when this Court adds it to the written contract of insurance.

As stated, the insurer had the right to include in this policy the stipulation, that, in addition to the insured being alive, he must be in good health. But, it did not do so, preferring to take its chances on any change of health, or its system of investigation. Its only stipulation being that the insured must be alive. Such was its stipulation. If any other conditions were desired, it was the duty of the insurer to include them in its contract, for, by the plain terms of its contract, it is positively stipulated that the written policy contains all the terms, stipulations and provisions between it and the insured.

We respectfully submit that this Court cannot, under any known theory of the law, make statements, which, by the terms of the policy, are only representations, unless made to defraud, into absolute warranties.

Under this head, the learned counsel for defendant cite and discuss many authorities, substantially having under consideration cases where the applicant had made false statements. As we have suggested, if the defense in this case had been that the insured had made a false statement, it would be incumbent upon the defense not only to prove its falsity, but it would be required to go further and prove that it was knowingly false, and intended to deceive the insurer, and the insurer was thereby deceived. This would permit the plaintiff to have shown the good faith and honesty of the insured, and that he exercised his best ability to give notice to the insurer, and that his actions were not knowingly wrong. These cases have no application.

But, supposing it be assumed, that some place, some where in this policy is to be found or imposed, as we may choose to name it, an obligation on the insured to notify the insurer of any change in his health occurring between the application and the delivery of the policy, it can only be upon the theory that the statements made by the insured in his application for the policy are continuing statements from the time the application was made until delivery of the policy. There is no other theory upon which any such obligation can be imposed upon the insured under this policy, and is the theory of some of the courts in their decisions cited by counsel for defendant. This must be true, and being true, such statements must be construed to be representations, and not warranties, in the absence of fraud. The trial Court held such statements to have been warranties. But, be that as it may, the plaintiff surely had the right to show good faith. She had the right to produce proof of good faith on the part of the insured for the consideration of the jury. This being true, she had the right to produce evidence that at the time the premium was paid and the policy delivered, the insured truthfully informed the insurer of this alleged change in his health. Upon this theory alone, the rejected evidence was competent, and should have been admitted. It was competent evidence to show good faith, and that the insured was not guilty of fraud. This was a question for the jury, not the Court.

SECOND

Counsel for defendant for their second proposition suggest, in a more or less involved statement,

that, even though the insured did inform the agent for defendant to whom he paid the premium, and who, on behalf of the defendant, delivered the policy to him, of the alleged changed condition of his health, that the knowledge so obtained by such agent would not be the knowledge of the defendant, so as to create an estoppel of waiver on the part of the defendant to make the defense pleaded.

This contention is based upon the following stipulation in the application, namely:

> "No statements or representations made or information given to a person soliciting or taking the application of the policy, shall be binding on the company or in any manner affect its rights unless they are reduced to writing and presented at the home office with the application."

That this stipulation had reference only to the statements in the application is too plain for argument, for it so plainly states. It is plainly stated that any such statements **therein referred** to must be in writing and presented to the home office **with the application.**

If this contention is not supported by this stipulation, it is manifest that the trial Court was clearly wrong in directing a verdict for defendant, for such Court based its ruling on this stipulation alone.

The defense in this case is not that any statement made by the insured was false; on the contrary, the defense is that he did not make any statement at all after the application had been delivered

to and was in the possession of the defendant, and before the policy was issued. Just how this could be delivered to the home office is somewhat difficult for us to conceive. There is no provision in this policy even suggesting any such information. In fact, plaintiff makes no claim of waiver.

We make no contention that any agent of the defendant had the power to or even attempted to waive any of the conditions of this policy, or that any provision of the policy was waived. It is our contention that the insured performed the provisions of the policy by him required to be done or performed. The position assumed by defendant is remarkable in the extreme. It is first contended that this Court should add to this contract of insurance certain stipulations, which the insurer did not choose to put into it in the first instance, and then to make the failure to perform such added stipulations **warranties** on the part of the insured, and an absolute defense to the payment of the sum due on such policy. On the other hand, it is insisted, with a firmness strange to behold, that the insured should be bound by every stipulation and provision therein contained. In other words, that as to the insured, he should be bound not only by the terms of the contract, but such additional terms pleasurable to the insurer. But, as to the insurer, it is contended that the contract should be modified so that it can escape the performance of its contract. To this we respectfully interpose our objections.

THIRD

It is next contended that Section 6435, Oregon Laws, should be held not applicable to the law of

this case. The theory upon which this contention is based, as we understand it, is not that it is violative of any of the constitutional provisions of the United States or of the State of Oregon, but that the power and authority of a corporation to define and limit the power of its agents is a matter of general jurisprudence, not a rule of property, and the Federal Courts will not enforce a statute which arbitrarily provides that corporations or parties engaged in writing life policies in Oregon must employ only certain licensed agents of good moral character, who shall at all times be the agent and representative of his principal in regard to its insurance business, although the state Court will enforce such laws.

This contention, as we understand it, is based upon the doctrine of Prudential Ins. Co. v. Moore, 231 U. S. 560; Hartford Fire Ins. Co. v. Nance, 12 Fed. (2nd) 575. In neither of these cases is found any such doctrine. In the Prudential Ins. Co. v. Moore case, it is held, if we understand it at all, that the question of good faith is a question for the jury and not for the Court. In that case, this Court plainly held, that the laws of the State of Georgia formed a part of the contract of insurance. In the Hartford Fire Ins. Co. case, the Court held, "the validity of a contract, of course, depends upon the applicable statutes and decisions of the state where the contract is made or to be performed . . . . It is also true that the Federal Courts in construing contracts will follow the state Courts where a statute or local rule of property is involved." The Court simply held that the contract in question was not to be determined by the laws of the State of Ohio, because it was not made there. The defend-

ant came into Oregon, and in plain terms accepted the provisions of the statutory laws of Oregon. It secured the appointment of its agents under the laws of the State of Oregon. It surely cannot be held that under such circumstances, it is not bound by such statutes. Besides, as we have suggested, the statute in question is surely constitutional. The defendant admitted, at least, as we understand it, this statute is enforcible in Oregon. If so, why not here? Furthermore, as we have stated, it is not our contention that this agent waived or modified any of the provisions of the contract. Our contention all along has been and is that Mr. Coblentz was the agent of the defendant, soliciting, procuring and delivering policies of insurance, and that he was the only man that the insured knew who represented the defendant, and that the insured, in good faith, notified him of his health condition.

FOURTH

The next contention suggested by counsel for defendant contains this statement:

> "The stipulations of the application to the effect that the knowledge of the agent shall not be the knowledge of the principal, and that the agent has no power to make, modify or discharge the contract of insurance, or to bind the company by making any promises respecting any benefits under the policy operated prospectively."

and, hence, it is argued that any notice of change of health of the insured to the party who solicited

and received the premium and who delivered the policy is not notice to the company.

Let us examine this provision of the policy. It reads:

> "That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued."

But, it cannot surely be contended that this provision of the policy has any application to the notice that the insured and his wife gave the Company.

The next provision of the policy reads:

> "3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

As we have heretofore pointed out, this certainly has no application whatever to the notice in question, for it is manifest, in fact, too plain for argument, that this provision of the policy applies only to the proceedings had before the application was received, not afterwards. It was not as to the matters occurring prior to the application that are involved here, but matters occurring after the ap-

plication had been delivered to and was in the possession of the insurer. There is nothing in the policy indicating to whom any notice should be given. There is nothing to the contrary found either in Hartford Fire Ins. Co. v. Jones, 15 Fed. (2nd) 1, or Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613. No such question is presented in either of these cases.

We do not contend that any knowledge acquired by the agent of the defendant who assisted the insured in making his application, or was present when the application was made, or acquired prior to the delivery of the application, is notice to the Company, for the simple reason that it is so stipulated in the policy. That is not the point here at all. We have heretofore in this brief and in our original brief filed in this Court discussed the phase of the case under this head.

In conclusion, we repeat that from any viewpoint the evidence offered and rejected was competent, (1) as actual notice to the insurer of the changed condition of the insured's health, and (2) that it was competent for the purpose of showing good faith, and to prove that the insured was not guilty of fraud.

Respectfully submitted,

G. C. FULTON,

LONG, CHAMBERLAIN & NYCE,

Attorneys for Plaintiff.

FILED
FEB 9 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 97.

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation.

SUPPLEMENTAL BRIEF.

CHESTER I. LONG,
GEO. E. CHAMBERLAIN,
PETER Q. NYCE,
G. C. FULTON,
Attorneys for Josephine Stipcich.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

PROPOSITIONS.

	Page
Statement	1
Assignments of error intended to be urged	3
Argument	4
When there is a conflict between statute and policy	4
The Policy is the entire contract, and all conditions must be in it	4
Agent must be licensed and he represents company in all matters	5
The Stipulation attempting to limit agent's authority is void	6
The Chamberlain and Wanberg cases should have been followed	7
Stipulation not applicable to subsequent events here involved	9
Between two constructions of Insurance Policy the one most favorable to insured to be taken	10
Mutual Life Company vs. Hilton Green not in point	12
Cases cited in defendant's in error brief not in point as there were no statutes involved making limitations in policy of agent's authority, void	14
Conclusion	14

STATUTES.

Oregon Laws, Section 6422	4, 7, 10
Section 4625	5
Section 6426	4, 10
Section 6435	5, 6, 7

CASES CITED.

	Page
American Surety Company vs. Pauly, 170 U. S. 144	11
Cable v. United States Life Insurance Company, 111 Fed. 19	5, 10
Continental Life Insurance Company vs. Chamberlain, 132 U. S. 304	4, 7
McMaster vs. New York Life Insurance Company, 183 U. S. 25	12
Merchants Liability Company vs. Smart, 267 U. S. 129	8
Moore vs. Aetna Life Insurance Company, 146 Pac. 151	12
Mutual Life Company vs. Hilton Green, 241 U. S. 613	12
National Bank vs. Insurance Company, 95 U. S. 673	11
National Insurance Company vs. Wanberg, 260 U. S. 71	4, 7, 8
New York Life Insurance Company vs. Fletcher, 117 U. S. 531	14
Northwestern Life Insurance Company v. Riggs, 203 U. S. 243	5, 10
Thompson vs. Phoenix Insurance Company, 136 U. S. 297	11
Thompson vs. Travelers Insurance Company, 13 N. D. 444, 101 N. W. 880	5, 10
Williams vs. Pacific States Fire Insurance Co., 251 Pac. 258	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 97.

JOSEPHINE SIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation.

SUPPLEMENTAL BRIEF

The entire record having been ordered by the Court to be sent up, this supplemental brief is based on such record and prior briefs.

STATEMENT.

This was a suit on a life insurance policy. The case was tried to a jury and at the close of all the evidence there was a motion by defendant for a directed verdict which was sustained. Judgment was entered for Defendant for costs on July 28, 1925 (R. 51). A motion for new trial was made and overruled. A bill of exceptions was allowed (R. 114) and assign-

ments of error (R. 64) were filed. Writ of error to the Circuit Court of Appeals, Ninth Circuit, was granted (R. 63). Statement of errors upon which plaintiff in error relied was filed. (R. 121.)

From the opinion of the District Court (R. 54) and from rulings made during the trial (R. 101, 105, 111, 112 and 113), it is clear that the Court held that the insured was bound to communicate to the Company information as to his changed condition of health, notwithstanding the fact there was nothing in the policy requiring him to do so. The District Court further held that notice to Coblentz was not notice to the company (R. 105). Both of these rulings by the District Court are assigned as errors by Plaintiff in error. (R. 64 to 69 inclusive, and R. 121 to 127, inclusive.) There was no decision in the Circuit Court of Appeals for the Ninth Circuit, that court having certified the question heretofore considered by this court (R. 132).

The policy, which is printed on pages 8 to 38, inclusive, of the Record, was dated March 26, 1924 (R. 10). There is a provision (R. 38) that the policy shall not take effect unless or until the full premium has actually been paid in cash. There is a receipt (R. 38) for $212.48 signed by Coblentz on March 19, 1924. The insured died on April 8, 1924 (R. 55). Dr. Forsstrom, who operated on the insured two years before the policy was issued, was consulted by the insured about the time the application was made and Dr. Forsstrom in his examination (R. 90) said "his health had been perfect since I operated, and he didn't — he looked perfectly as well as before." Dr. Forsstrom gave him a prescription "just to aid the digestion" (R. 90), the insured having complained of a distressed feeling after eating, but the Doctor "didn't consider it very much" (R. 87, 91), but "con-

sidered that as just a little trifle" (R. 93). The doctor considered that it might be a recurrence of the former trouble, but he never mentioned that to the insured (R. 93). Doctor Sommer testified also as to the insured's condition on March 7 and 8, 1924 (R. 93), and after an examination "I advised him (the insured) that he could live a long time with it, or he might have trouble at any time. * * * It is an uncommon condition that people who have been operated on and a gastro enterostomy performed that they are not always perfectly well after an operation of that type; that is, they may have gastric symptoms; symptons of distress or symptoms of disturbances following an operation even without an ulcer being present" (R. 94, 95, 96, 97). Mrs. Stipcich testified (R. 102) "Dr. Sommer told me that my husband was in good physical condition." She also gave Doctor Sommer's statement respecting the stomach disturbance "he told me that it was something wrong; he didn't mention ulcer; he said it might be an ulcer but he didn't know. It was something, but it wasn't very much, but it might give him trouble later, or when he gets older, and he'd better go right then" (R. 103-104).

ASSIGNMENTS OF ERROR INTENDED TO BE URGED.

The plaintiff in error intends to urge the following assigned errors:

(1) In refusing to admit testimony to the effect that the agent of the company was advised of the insured's change of health. (Assignments Nos. 1, 2, 3, 4, R. 121, 122, 123.)

(2) In ruling that notice to the agent was not notice to the Company. (Assignment No. 9, R. 123.)

(3) In ruling that it was the duty of the insured to make a full disclosure of his physical condition down to the issuance of the policy. (Assignment No. 10, R. 124.)

ARGUMENT.

When There is a Conflict Between Statute and Policy.

Defendant in Error contends that the condition of health of Applicant between the date of application and delivery of the policy is material. It is not material under the provision of the policy. There are only two conditions: (a) That the full first premium has been paid to and accepted by the Company, and, (b) That this shall be during the lifetime of the Applicant. The statutes of Oregon are a part of the policy, as though written therein. Where there is a conflict between a provision in the policy and a statute, the provision in the policy is void. (National Insurance Company v. Wanberg, 260 U. S. 71; Continental Life Insurance Company vs. Chamberlain, 132 U. S. 304.)

The Policy is the Entire Contract, and All Conditions Must Be in It.

The Oregon laws, of which this Court will take judicial notice, provide that "the policy shall constitute the entire contract between the parties" (Section 6426) and "no life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract" (Section 6422). (Plaintiff's Brief, 9, 12.)

Notwithstanding the above provisions of law, the Defendant in Error wants written into the contract that "the insured must be in good health when the pre-

mium was paid and the policy delivered. The policy does not contain any such provision. It could have been put in and would have been valid. It is not unusual for life insurance policies to contain such restrictive provisions. In Northwestern Life Insurance Company v. Riggs, 203 U. S. 243, the policy contained this provision: "This policy shall not be in force until the first premium is paid and the policy delivered to and accepted by the insured *while in good health.*" In Cable vs. United States Life Insurance Company, 111 Federal 19, this was in the policy: "Upon payment of the first premium and delivery of the policy during my life time, *sound in health and in insurable condition.*" In Thompson vs. Travelers Insurance Company, 13 N. D. 444, 101 Northwestern 900, the policy contained this provision: "This policy shall not take effect unless the first premium has actually been paid *while the insured is in good health.*" The Cable and Thompson cases are both cited in the brief of the Defendant in Error.

Agent Must Be Licensed and He Represents Company in All Matters.

The law provides that the agent must be licensed at the request of the Company to do business in the State (Section 6425). (Plaintiff's in Error Brief, 11.) He is made the agent of the Company in *all* matters relating to the application and the policy, and not the agent of the Insured, and "all provisions in the application and policy to the contrary are void and of no effect whatever" (Section 6435). (Plaintiff's in Error Brief, 13). Defendant in Error contends that any statement made to or any knowledge as to facts on the part of the licensed agent Coblentz

pertaining to the Insured, were not made to or brought to the knowledge of the Company because of the stipulation in the policy (R. 28). This stipulation is in direct conflict with Section 6435 (Plaintiff's Brief, 13). Coblentz was the agent of the Company and not of the insured, in all matters relating to the application and the policy. This stipulation is an attempt to limit the agent's authority by providing that knowledge that came to him in relation to the application and the policy was not considered as having been made to or brought to the knowledge of the Company. This stipulation has, in fact, no relation to the point in controversy. It only provides that the entire contract must be stated in either Part A or B of the application. There is no attempt or purpose on the part of the Plaintiff in Error to set up a contract not included in A or B. It is the Company that is attempting to write something into the contract that is not stated in either A or B. The offer of proof in the question (R. 105), could not possibly have been contained in A and B, for it related to subsequent events.

The Stipulation Attempting to Limit Agent's Authority is Void.

There evidently was an attempt in this provision of the policy to limit Coblentz's authority by making him the agent of the applicant and not the agent of the Company in all matters relating to the application and policy. This could have been done were it not for Section 6435, which made him the agent of the Company in *all matters*. This notice of a change in health was a matter relating to the business in hand. Notice to Coblentz was notice to the Company, any provision

in the application notwithstanding, for such provision was void under Section 6435.

There was an effort made to write a provision or condition in the policy that was not in it. This could not be done under 6422 (Plaintiff's in Error Brief, 9). Where there was a provision in the policy which was forbidden by the law, it was void. The Company wants to read into the policy that he must be in good health when the policy is delivered. It is not there. The proof offered (R. 105) was material if the facts set out in Defendant's in Error evidence (R. 76 to 105) were material, for it showed notice to the Company and good faith on the part of the Applicant.

The Chamberlain and Wanberg Cases Should Have Been Followed.

We contend that Continental Life Insurance Company vs. Chamberlain and National Insurance Company vs. Wanberg, *supra*, are controlling. In the Chamberlain case, the Iowa statute was as follows: "Any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be soliciting agent of the insurance company or association issuing a policy on such application, or a renewal thereof, anything in the application or policy to the contrary notwithstanding." A provision in the policy was to the effect that the contract between the parties is completely set forth and "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated." The insured was asked whether he had any other insurance. He was not clear as to whether cooperative societies were included in

the question. The agent when advised, determined that they were not covered, and wrote "no other" insurance. The insured made a full disclosure to the agent, as was done in the instant case. This court held that by force of a statute he was the agent of the company and that the company was estopped from saying that its question as put by the agent and interpreted by him, embraced insurance in cooperative associations. This court held that the Solicitor was the agent of the Company and not of the insured, and said "by force of the statute he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company, nor could the company by any provision in the application or policy, convert him into an agent of the assured." The application contained the stipulation that if any of the answers were untrue the policy should be void. He had other insurance in a cooperative company, but he did not deceive the agent. The agent wrote the answer "no other" when he should have written "yes."

In National Insurance Company vs. Wanberg, *supra*, it was held that consent in a policy that it should not take effect until a certain general agent examined it, was void, because in conflict with a state statute that said it should take effect within 24 hours from the time the local agent took the application for hail insurance. This Court said: "It is clear that if the statute is valid, such a consent is void, because it defeats the very object of the statute." This case is cited with approval in Merchants Liability Company v. Smart, 267 U. S. 129, where this court said: "It is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately

connected with the common good that the State creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustice in the exercise of their corporate functions."

Stipulation Not Applicable to Subsequent Events Here Involved.

That no statement shall be considered as made to the company unless stated in either part A or B, cannot possibly refer to the offer of evidence that was rejected. It is a provision in the application and a part of it. The evidence rejected relates to a subsequent event happening after Parts A and B had been made. It could not on that account have been included in them. If it was competent for the company to show that there was a change in the insured's condition of health after the application was made and before the policy was delivered then in all fairness and to show his good faith and that he was not guilty of fraud, his widow should be allowed to show that before the policy was delivered notice of such change was given the Company through its agent. To claim that such notice should have been stated in Parts A and B, is to require the impossible. If that was the contract it became impossible of performance and was therefore void.

The stipulation may mean:

(a) That the entire contract must be in Parts A and B and in writing. If so, it is in accord with the statute and valid but it has no relation to subsequent events, or

(b) That notice to the agent is not notice to the Company and is a limitation on his authority. If so it is void for it conflicts with the law that makes Coblentz the agent of the company in *all* matters, or

(c) That all subsequent events must be in A and B. If, so, it is impossible of performance and void, or

(d) That the notice to Coblentz must have been in writing and by him sent to the company to be notice to it. If so it is void being in conflict with Sections 6422 and 6426.

Between Two Constructions of Insurance Policy the One Most Favorable to Insured to be Taken.

In this case, it is necessary to insert words in the policy that are not there, to make it void. The Circuit Court of Appeals was evidently in doubt as to the construction to be put on the stipulation submitted with its question (R. 28, 137). Following the rule announced by this court it should have resolved the doubt in favor of the insured. It is a strained construction to apply that stipulation to events subsequent to the making of the application which could not be stated in A or B of the application. There were only two conditions subsequent to the delivery of the policy which would fix liability on the company: First, the full first premium must be paid and accepted; second, the acceptance must be during the life time of the insured. If the company wanted other conditions similar to those in Northwestern Life Insurance Company vs. Riggs, Cable vs. U. S. Life Insurance Company and Thompson vs. Travelers Insurance Company, *supra*, it should have written them into the policy. By the District Court's rulings, words were construed into the policy and application as to the good health of the insured

that were not written therein. Notice to Coblentz was construed not to be notice to the company because Coblentz was a soliciting agent only. Both of these constructions were in favor of the company on points on which the application and policy were silent. Under these circumstances the District Court should have followed the rule announced repeatedly by this court and also declared by the Supreme Court of Oregon. In National Bank vs. Insurance Company, 95 U. S. 673, this court announced the rule to be,

> "The policy having been prepared by the insurers, it should be construed most strongly against them."

In Thompson vs. Phoenix Insurance Company, 136 U. S. 297, this court said,

> "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured."

In American Surety Company vs. Pauly, 170 U. S. 144, this court announced the reason for the rule, citing an English case:

> "'It (a life policy) is, of course, prepared by the company, and if therefore there should be any ambiguity in it, must be taken according to law most strongly against the person who prepared it.' • • • That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

In McMaster vs. New York Life Insurance Company, 183 U. S. 25, this court said,

> "If policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract."

The above rule is also approved in Oregon in Williams vs. Pacific States Fire Insurance Company, 251 Pac. 258, citing Moore vs. Aetna Life Insurance Company, 146 Pac. 151, 47 L. R. A. 1915, D 264. The rule is thus stated in the above cases,

> "It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured."

By refusing to follow the above well-established rule, the District Court committed an error. Fraud was alleged in the answer on the part of the insured (R. 44, 45), but no attempt was made to prove it at the trial. The case was decided against plaintiff in error by an erroneous construction given to paragraphs 3 and 4 of the policy (R. 28).

Mutual Life Company vs. Hilton Green Not in Point.

In Mutual Life Insurance Company vs. Hilton-Green, 241 U. S. 613, cited by the Defendant in Error in its brief, the insured made representations to the agent which were untrue and which were incorporated in his application for insurance. They were also material to the risk as

they related to a physical examination when there was none, and to another application that was declined. These would have been sufficient alone to void the policy. But the question was whether the Company was estopped by the acts of the agent in making out applications containing these untruths, namely, that there was no medical examination, and the fact that the doctor for the Company signed a medical report when there was no examination. The statute of Florida was broad as to the powers of an agent. One who received money on contract of insurance was to be deemed to all intents and purposes an agent or representative of the Company. This court found for the company on the theory that the agent was not acting for it when he presented an application containing material misrepresentations under circumstances known to the applicant which negatived any probability that the actual facts would be revealed to the Company.

That case does not touch the instant case. First, the application in this case contained true statements. As to the later facts alleged to constitute a change of conditions, they were disclosed to the agent, certainly not with an idea of having him conceal them from the Company, but on the contrary, that the Company might know the facts. If there was a duty to disclose it was attempted to be carried out by the insured, and certainly the agent was not cooperating with the insured in withholding material information from the Company. The insured had reason to believe that the information would be communicated to the Company if its agent thought it necessary.

Cases Cited in Defendant's in Error Brief Not in Point as There Where No Statutes Involved Making Limitations in Policy of Agent's Authority, Void.

We admit that if it were not for the Oregon laws, the authority of agent Coblentz could have been limited as it was in New York Life Insurance Company v. Fletcher, 117 U. S. 531, cited in the defendant's in error brief. A number of cases cited by Defendant in error in its brief are cases in which the authority of the agent is limited by the policy. In Oregon the authority of the agent is made, by statute, unlimited. Defendant in error takes two positions that are inconsistent: *First*, that a new condition shall be written into the policy requiring proof of Applicant's good health at the time the policy was delivered. *Second*, that notwithstanding the Oregon law which made Coblentz the licensed agent of the company in *all matters*, yet notice to him of Applicant's condition of health after the application and before the delivery of the policy, was not notice to the Company.

Conclusion.

This case was tried upon the theory that notice to the company must be given of any change in the condition of health of the insured after the application was made and before the delivery of the policy. There is nothing in the policy requiring such notice and in Oregon the entire contract must be in the policy and it must include all conditions and provisions relating to the contract. The only conditions in this policy were that the premium must be paid and accepted during the life time of the insured. This was done.

The other theory of the District Court was that no

tice to Coblentz was not notice to the company. This also was error under the Oregon law. Coblentz was a licensed agent and there could not be and there were not any limitations on his authority. The District Court referred to him as a "soliciting agent." The statute made him the agent of the company *in all matters* relating to the application and the policy and not the agent of the insured, and "all provisions in the application and policy to the contrary are void and of no affect whatever." The District Court in directing the verdict for the defendant committed error and the case should be reversed.

Respectfully submitted,

CHESTER I. LONG,
GEORGE E. CHAMBERLAIN,
PETER Q. NYCE,
G. C. FULTON,
Attorneys for Plaintiff in Error.

Supreme Court, U. S.
FILED
SEP 21 1927
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 97

JOSEPHINE STIPCICH,
Plaintiff in Error,
vs.
METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

F. ELDRED BOLAND,
SAMUEL KNIGHT,
Balfour Building, San Francisco,
Attorneys for Defendant in Error.

Table of Authorities Cited

	Pages
Am. National Bk. v. Miller, 229 U. S. 517	25
Aetna Life Ins. Co. v. Moore, 231 U. S. 543	10, 18, 20, 25
American Surety Co. v. Pauly, 170 U. S. 133	25
Baldwin v. Canadean Ins. Co., 56 Mo. 151; 17 Am. Rep. 671	10
Bothwell v. North Amer. Accident Ins. Co., 1911, 167 Mich. 274, 132 N. W. 1067	21
Boston Ins. Co. v. Hudson, 1926, 11 Fed. (2d) 961	21
British Equitable Ins. Co. v. Great Western R. Co., 382 L. J. Q. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561	7
Bullard v. Pilot F. Ins. Co. et al., 189 N. C. 31, 126 S. E. 179	23
Butler v. Michigan Mutual Life Ins. Co., 184 N. Y. 337, 77 N. E. 398	21
Cable v. U. S. Life Ins. Co., 111 Fed. 49	7
Canning v. Farquhar, L. R. 16 Q. Div. 727	7
Carleton v. Patrons A. M. Fire Ins. Co., 82 Atl. 649, Me. 170 S. W. 474	7
Carruthers v. Kansas Mutual Life Ins. Co., 1901, 108 Fed. 487	21
Christian & Brough Co. v. St. Paul Fire & Marine Ins. Co., 1925, 5 Fed. (2nd) 489	21
Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 80 Pac. 609	22
Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304	19, 26, 27, 28
Cook v. Standard L. & A. Ins. Co., 84 Mich. 12, 47 N. W. 568	22
Crook v. N. Y. Life Ins. Co., 112 Md. 268, 75 Atl. 788	22
DeChamp v. New Jersey Mut. L. Ins. Co., 3 Ins. L. J. 89, Fed. Cas. No. 4219	10
Distilled Spirits, 11 Wall. 356	25
Domitile v. Detroit, etc. Ins. Co., 147 La. 549, 85 So. 236	22
Dreer v. Security Fire Ins. Co., 94 Ia. 471, 62 N. W. 798	21
Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 11 S. W. 1016	23
Equitable Life Ass. Soc. v. McElroy, 83 Fed. 631	7, 8

Pages

Fire Association of Philadelphia v. Nims, 1925, 9 Fed (2nd) 28 21

Fischbate v. F. & C. Co. of N. Y., 146 N. C. 487, 59 S. E. 154 23

Garretson v. Merchants & Bankers Ins. Co., 81 Ia. 727, 47 N. W. 1047 21

Gish v. Ins. Co. of N. Y., 76 Ohio St. 87, Par. 869 22

Gordon v. United States Casualty Co., Penn. Ch. Rep. 34 S. W. 28 10

Graham v. Security Mutual Ins. Co., 6 L. A. Ann. 852 7

Grand View Building Ass'n v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 240 23

Hayes v. Metropolitan Life Ins. Co., 200 Mass. 479, 128 N. E. 780 22

Harris v. Security Mutual Life Ins. Co., 130 Iowa, 325, 170 N. W. 474 7

Hart v. Bristol & F. A. M. Ins. Co., 80 Conn. 440, 82 Pac. 802 7

Hartford Fire Ins. Co. v. Jones, 15 Fed. (2nd) 3 ..... 21, 23

Hartford Fire Ins. Co. v. Nims, 12 Fed. (2nd) 1024 ..... 21, 23

Insurance Co. v. Mahone, 21 Wall. 152 ..... 14, 19

Insurance Co. v. Weckerly, 13 Wall. 222 ..... 14, 19

Iverson v. Metropolitan Life Ins. Co., 131 Ga. 740, 63 Pac. 689 22

John Hancock L. Ins. Co. v. Hogan, 180 U. S. 118, Fed. 572 23

John R. Davis Lumber Co. v. Hartford F. Ins. Co., 9 Wyo. 26, 70 N. W. 54 26

Johnson & Stevens v. Rhode Island Ins. Co., 172 N. C. 142, 89 S. E. 124 23

Kansas v. [illegible] Standard Life Ins. Co., 1 Fed. (2nd) 18 2

Kelly v. Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 292 10

Ketchum v. Am. Mut. Acc. Assn., 117 Mich. 521, 76 N. W. 5 22

Kohl v. Farmers' Coop. Co., 21 L. R. A. (N. S.) 20

Lashmet v. Northern Mutual Ins. Co., 1 L. R. A. (N. S.) 1124, 4 Ins. L. J. 394 10

Lumber Underwriters v. Rife, 237 U. S. 605 12

Pages

Maryland Casualty Co. v. Campbell, 255 Fed. 447 23
McCormick v. Security Mutual Life Ins. Co., 220 N. Y. 447, 116 N. E. 74 ..... 21, 22
Merchants & Planters Ins. Co. v. Marsh, 34 Okl. 453, 125 Pac. 1100 22
M'Lanahan v. Universal Insurance Co., 1 Pet. 170 ..... 7, 8, 31
Modern Woodmen v. Weekley, 34 Okl. 463, 139 Pac. 1138 ..... 21, 22
Morgan v. Amer. Cent. Ins. Co., 1917 ... 80 W. Va. 1, 92 S. E. 84 22
Mosher v. Assur. L. Ins. Co., 111 U. S. 445 23
Mulrooney v. Royal Ins. Co., 161 Fed. 833 ..... 21, 23
Mutual Ben. L. Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. ed. 466 10
Mutual Life Ins. Co. v. Hillmon, 145 U. S. 611 ..... 12, 24, 24, 25, 27, 28
New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610 10
New York Life Ins. Co. v. Fletcher, 117 U. S. 519 ..... 12, 26, 30
New York Life Ins. Co. v. O'Hara, 160 Mass. 214, 36 So. 479 22
New York Life Ins. Co. v. Patten, 151 Ga. 183, 106 S. E. 181 22
New York Life Ins. Co. v. Russell, 77 Fed. 94 26
Northern Assurance Co. of London v. Case, 1926 ... 12 Fed. 2nd, 551 21
Northern Ass. Co. v. Grand View Building Ass., 183 U. S. 308 ..... 10, 15, 26
Northwestern Nat. Ins. Co. v. Mize, Tex. Ct. App., 29 S. W. 670 22
Ohio Farmers Ins. Co. v. Titus, 82 Ohio St. 161, 92 N. E. 82 22
Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311 ..... 12, 26
People's Bank of Beaufortville v. National etc. Ins. Co., 193 La. 951, 18 So. 829 22
Perdue Ins. Assn. v. Gerot, 79 Ark. 115, 96 S. W. 365 21
Pettingill & Co. v. Ins. Co., 106 Kan. 482, 164 Pac. 599 22
Phoenix Ins. Co. v. Hart, 140 Ind. 241, 39 N. E. 940 22
Phoenix Mut. L. Ins. Co. v. Randle, 120 U. S. 181 23
Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377 7
Porter v. U. S. Life Ins. Co., 166 Mass. 181, 43 N. E. 978 22

Pages

Powell v. Prudential Ins. Co. of Amer., 153 Ala. 611, 45 So. 208 22

Prudential Ins. Co. v. Moore, 1913, 233 U. S. 560 23

Rabb v. N. Y. Life Ins. Co., 188 S. C. 137, 93 S. E. 711 22

Reed v. Equitable, etc. Ins. Co., 17 R. I. 785, 24 Atl. 833 21

Ruthven v. American Fire Ins. Co., 92 Ia. 316, 60 N. W. 663 22

Salvato v. Firemen's Ins. Co., 1920, 42 R. I. 433, 108 Atl. 579 21

Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708 22

Southern L. Ins. Co. v. Kempton, 56 Ga. 139 10

Southern States Fire Ins. Co. v. Vann, 69 Fla. 549, 68 So. 647 21

Supreme Council, etc. v. Taylor, 1903, 121 Fed. 66 21

Thompson v. Travelers Ins. Co., 33 N. D. 444, 161 N. W. 960 7

Thornton v. Travellers Ins. Co., 116 Ga. 121, 42 S. E. 287 22

Traill v. Baring, 4 De G. J. & S. 318, 10 L. T. N. S. 215, 12 Week. Rep. 678, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 577 7

United F. Ins. Co. v. Thomas, 82 Fed. 408 16

U. S. Life Ins. Co. v. Smith, 92 Fed. 501 27

Watson v. Delafield, 2 Caines 224, 1 Johns. Cas. 2 Johns. 526 7

West End Hotel & Land Co. v. American Fire Ins. Co. of N. Y., 1896, 74 Fed. 114 21

Whitley v. Piedmont & A. L. Ins. Co., 71 N. C. 480 7

Worth v. German Ins. Co., 65 Mo. App. 581 16

Wood v. Firemen's F. Ins. Co., 126 Mass. 316 26

Wyse-Thaiman, et al. v. Maryland Casualty Co. of Baltimore, 1910, 193 Fed. 55 21

Zimmerman v. Home Ins. Co. of N. Y., 77 Ia. 691, 42 N. W. 462 22

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No.

JOSEPHINE STIPCICH,
Plaintiff in Error,
vs.
METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The following question and supporting facts are certified to this court by the United States Circuit Court of Appeals for the Ninth Circuit:

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Certifying a Certain Question or Proposition of Law to the Supreme Court of the United States under Section 239 of the Judicial Code.

Before Gilbert, Hunt and Rudkin, Circuit Judges.

STATEMENT OF FACTS.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"It is understood and agreed:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on part B hereof, they shall form the basis of the contract of insurance, if one be issued.

"2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance; (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this

act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions: * * *

"(c) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X ray should be taken. On March 7 or 8, he consulted a physician in Portland, Ore-

gon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made on her behalf:

"That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Goldentz, 4 fol. 11 agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at the time Mr. Julien Goldentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer thereon referred to was one of the doctors consulted by the insured at Portland, Oregon. The court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the court directed a verdict in favor of the defendant.*

Question Certified.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel in view of the stipulations contained in the application for the insurance and more especially of the stipulations

"That any statement made to or by, or any knowledge or the want of any agent, medical examiner or any other person as to any facts pertinent to the Applicant shall not be considered as having been made to or brought to the knowl

*Coblentz testified (Tr. p. 26): "It is my duty to look for insurance, collect premiums when they are due. I have nothing to do with the acceptance or issuance of policies."

Hoffman testified (Tr. p. 29): "I am Assistant Manager of the defendant Metropolitan Life Insurance Company at its offices at Astoria, Oregon, and was such during all the transactions referred to in this action. * * * I have no authority to pass upon applications for policies or pass upon medical examinations."

edge of the Company unless stated in either part A or B of this application."

WM. B. GILBERT,
WILLIAM H. HUNT,
FR. H. RUDKIN,
United States Circuit Judges.

The facts stated and question propounded may be paraphrased and stated generally as follows:

First: It is implied in the question and true as a proposition of law that the representations made by an applicant for life insurance must be true as of the time of the consummation of the contract and if there is any change in the physical condition of the applicant material to the risk occurring between the making of the application and the consummation of the contract, it is imperative upon him to notify the insurer.

Second: Whether in view of the stipulations of the policy, as a proposition of general jurisprudence, the knowledge of a soliciting agent for a life insurance company concerning matters material to the risk, not contained in the application or otherwise brought to the attention of the company, is imputed to his principal in such manner and to such extent as to create a waiver or estoppel. We contend it is not.

Third: Whether in view of the stipulations of the policy, such propositions of general jurisprudence are changed or abrogated by the statutes of Oregon referred to. We contend they are not.

Fourth: Whether information to Coblentz, the soliciting agent of the insurer, in view of the stipula-

tions of the policy and the principles discussed in Sections Two and Three herein, satisfies the requirement that any change in the physical condition of the applicant must be brought to the attention of the insurer. We contend it is not.

FIRST

IT IS IMPLIED IN THE QUESTION AND TRUE AS A PROPOSITION OF LAW THAT THE REPRESENTATIONS MADE BY AN APPLICANT FOR LIFE INSURANCE MUST BE TRUE AS OF THE TIME OF THE CONSUMMATION OF THE CONTRACT AND IF THERE IS ANY CHANGE IN THE PHYSICAL CONDITION OF THE APPLICANT MATERIAL TO THE RISK OCCURRING BETWEEN THE MAKING OF THE APPLICATION AND THE CONSUMMATION OF THE CONTRACT IT IS IMPERATIVE UPON HIM TO NOTIFY THE INSURER

*The authorities are unanimous that any change in the physical condition of the applicant pending the consideration of his application by the insurer and prior to the actual consummation of the contract by delivery of the policy and payment of the premium, must be brought to the attention of the company.**

---

*Mutual Life Ins. Co. of N. Y. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. Rep. 676, 60 L. Ed. 1197.

Penn. Mutual Life Ins. Co. v. Mechanics Savings Bank & Trust Co., 72 Conn. 671, 45 Atl. 953, 50 L. R. A. 193, 77 Am. St. Rep. 343.

Equitable Life Assurance Society v. McElroy, 83 Fed. 631, 27 C. C. A. 592, 40 L. R. A. 33.

Callen v. Metropolitan Life Ins. Co., 111 Fed. 39, 49 C. C. A. 183.

Wilson v. Phoenix Mutual Life Ins. Co., 25 Fed. Cas. No. 17,857, 4 Dillon 556.

Westlake v. Piedmont & Arlington Life Ins. Co., 71 N. C. 486.

Thompson v. Travelers Ins. Co., 15 S. D. 444, 90 N. W. 266, 58 L. R. A. 923, 1 Ann. Cas. 1.

Gardiner v. Colonial Mutual Ins. Co., 6 L. R. A. (Ann. Cas. 1914 D.) 1057, 1 Ann. Cas. 1914 D. 1057.

Hall v. Mutual Life Ins. Co., 80 Cal. 440, 22 Pac. 302, 5 L. R. A. 705, 13 Am. St. Rep. 168.

Cushman v. Phoenix Mutual Life Ins. Co., 109 Me. 70, 82 Atl. 649, 39 L. R. A. (N. S.) 1, Ann. Cas. 1914 C. 1.

Bowers v. Security Mutual Life Ins. Co., 130 Iowa 323, 170 N. W. 474, 2 A. L. R. 1564.

Franklin Bureau, 4 Dec. C. A. S. 318, 10 L. C. N. S. 215, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 577, 12 Week. Rep. 678.

Royal Exchange Ins. Co. v. Grand Western R. Co., 38 L. J. Ch. N. S. 354, 20 L. T. N. S. 442, 17 Week. Rep. 561.

Cushing v. Farquhar, 1 R. 16 Q. Div. 337.

In *Equitable Life Ass. Soc. v. McElroy*, United States Circuit Court of Appeals, the court said:

> "They [the proposals and the ultimate contract] are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty, and truthfulness, impose upon him the duty of disclosing to the [insurance] company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed. An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract."

Justice Story in *M'Lanahan et al. v. The Universal Insurance Company*, said:

> "The contract of insurance has been said to be a contract uberrimæ fidei, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same informa-

tion for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the maxim applies, qui facit per alium, facit per se. His own knowledge, in such a case, infests the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or having the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence, the information might have been communicated, so as to have countermanded the insurance, the policy is void."

Of course, if the contract of insurance is actually consummated before the loss of the property insured, or before the change of condition on the part of the person insured, no duty devolves upon the insured to communicate such loss or change to the insurer; and all of the cases which are sometimes relied upon as authority for the proposition that the insured is at no time after his application for insurance bound to disclose facts material to the risk, will be found to admit either expressly or impliedly, the general principle under consideration and to have based their decision entirely upon the ground that the contract was

consummated or completed before the happening of the contingency relied upon to defeat the policy.†

In the case of *Mutual Benefit Life Ins. Co. v. Higginbotham*, relied upon by plaintiff in error, this court recognizes the principle. That was a case of a revival of an expired policy, not the placing of a new policy. The insured made application for the revival of his policy and delivered a certificate of health on October 1, 1870. The revival certificate was delivered on October 14, 1870. It was contended that between October 1st and 14th, a change took place in the condition of the insured which should have been brought to the attention of the insurer. The court says:

> "The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the first day of that month."

In other words, the court held that the insured was not bound to communicate to the insurer changes in his physical condition after the consummation of the contract. The court further says:

> "*If we assume* it to be true, as a general proposition, that the policy speaks from the date of its issue, and *that the obligation of the applicant to make a full disclosure continues down*

†*Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380; 24 L. Ed. 490; *De Camp v. New Jersey Mut. L. Ins. Co.*, 3 Ins. L. J. 89; Fed. Cas. No. 3,719.
Southern L. Ins. Co. v. Kempton, 56 Ga. 239.
Keim v. Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291.
Baldwin v. Chouteau Ins. Co., 56 Mo. 131, 17 Am. Rep. 671.
Worth v. German Ins. Co., 65 Mo. App. 582.
Gordon v. United States Casualty Co., (Tenn. Ch. App.) 54 S. W. 38.
Lehman v. Northern Maritime Ins. Co., L. R. 10 C. P. 179; 4 Ins. L. J. 394.

> *to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the Company, we do not advance essentially in the case before us.* The question recurs: when was the contract of Dr. Day consummated? If on the 11th day of October, when the renewal receipt was delivered, as the Company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract, by the intention and understanding of the parties, relates to the first of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the Company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. *It is not necessary, therefore, to question the principle assumed in the authority quoted, or examine the cases cited to sustain it.*"

The other cases cited in the footnote are to the same effect.

In the present case, as appears from the statement of facts, the change in condition occurred prior to the delivery of the policy and the application itself provides:

> "That the Company shall incur no liability under this application until it has been received, approved and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the life time of the applicant." (Transcript p. 28.)

Hence the *Higginbotham* case cannot apply.

SECOND

WHETHER IN VIEW OF THE STIPULATIONS IN THE POLICY, AS A PROPOSITION OF GENERAL JURISPRUDENCE, THE KNOWLEDGE OF A SOLICITING AGENT FOR A LIFE INSURANCE COMPANY CONCERNING MATTERS MATERIAL TO THE RISK NOT CONTAINED IN THE APPLICATION OR OTHERWISE BROUGHT TO THE ATTENTION OF THE COMPANY IS IMPUTED TO HIS PRINCIPAL IN SUCH MANNER AND TO SUCH EXTENT AS TO CREATE A WAIVER OR ESTOPPEL. WE CONTEND IT IS NOT.

An insurer has the right to limit its agents' authority in the respect stated in the question certified and such limitation is binding upon the insured where brought to his notice; and such limitation is necessarily and conclusively brought to his notice when it is made a part of the application.

In the case of *New York Life Insurance Company v. Fletcher*, the action was upon a policy of life insurance in the sum of $10,000. The insured in his application made certain representations concerning his health and physical condition which were untrue and material to the risk. The beneficiary pleaded and proved that the soliciting agents of the insurer knew of the true condition of the insured and the falsity of the representations and that they had advised the insured that these representations were but a mere formality and had inserted false answers in the application.

The application, however, provided that:

"No statements or representations made or information given to a person soliciting or taking the application of the policy, shall be binding on the company or in any manner affect its rights unless they are reduced to writing and presented at the home office with the application."

This court said (p. 529):

"It is, of course, not necessary to argue that the agent had no authority from the Company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the Company were deceived by the fraudulent contrivance of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the Company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. * * *

"But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. * * * But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application he would have seen that it stipulated that the rights of the Company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. *The Company, like any other principal, could limit the authority of its agents,*

and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

The court went on to say (p. 531):

"The present case is very different from *Ins. Co. v. Wilkinson*, 13 Wall. 222 (80 U. S. bk. 20, L. ed. 617), and from *Ins. Co. v. Mahone*, 21 Wall. 152 (88 U. S. bk. 22, L. ed. 595). In neither of these cases was any limitation upon the powers of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. *Nothing in these cases has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements.*"

The court further says, (p. 534):

"There is another view of this case equally fatal to a recovery; assuming that the answers of the assured were falsified, as alleged, the fact would at once be disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the Company, and it would have been his duty to make the fact known to the Company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. *The retention of the policy was an*

approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.

"The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated; a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctifying it."

The opinion of this court in the case of *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, crystallizes the law upon the subject. That case involved a policy of fire insurance which provided (p. 311) that it should be void if the insured had other insurance on the property covered thereby. The plaintiff (insured) did have other insurance, but claimed that the insurer's agent had been informed of the fact, and pleaded a waiver and estoppel to set up the fact of other insurance in defense of the action upon the policy. *The policy further provided* (p. 312) *that no officer or agent had the power to waive any of the conditions or provisions except and unless endorsed on the policy.*

This court said (p. 341):

"We do not consider it necessary or profitable to examine in detail the decisions of the circuit

courts or of the circuit courts of appeals. It is sufficient, for our present purpose, to say that the Circuit Court of Appeals for the Seventh Circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (*United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 547, 82 Fed. 1003), and that the Court of Appeals for the Eighth Circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. * * *"

The court then reviews the cases on the subject and announces the principles applicable (p. 361):

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; *that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing.*

either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

The court then applies the principles to the case then before it, saying (p. 363):

"It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the

jury have found, that the agent had notice or knowledge of the existence of insurance existing in other company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. *In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured.*"

The court concludes the opinion, by stating (p. 364):

"Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. *It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony.* Increased importance should be given to the rules involved in this discussion by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy."

The case of the *Aetna Life Insurance Co. v. Moore*, is to the same effect. The insured, one Salgue, applied

to the Aetna Life Insurance Company for a policy on his life. The policy provided, among other things:

> "*No agent or other person not an executive officer can waive any of the conditions of this policy, nor make any agreement binding upon said Company.*"

The insured represented himself in good health, but was, in fact, found to be afflicted with heart disease, and upon this ground the insurer resisted payment of the policy. Plaintiff claimed, however, that Salgue had correctly informed the medical examiner of his condition.

The court says (pp. 559-560):

> "It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German American Mut. Life Asso. v. Farley, supra, is also cited, and being a Georgia case, its authority is especially urged.
>
> "*There are, however, later cases which enforce the provisions of a policy*, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner, or other person, and not contained in' the application, should 'be taken or construed as

having been made to or brought to the notice or knowledge of the company, "or as charging it with any liability by reason thereof". And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

"*The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by* Northern Assur. Co. v. Grand View Building Asso., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312."

We, therefore, submit that the principles of law as a proposition of general jurisprudence, have been settled by this court to the effect that an insurer may limit the authority of its agent and may provide that the knowledge of the agent shall not be the knowledge of the principal unless conveyed to the principal in a definite and stipulated way and that such limitations are binding upon the insured when brought to his attention; and that such limitations are conclusively brought to his attention when contained in the application and or policy.

This court itself has said that these propositions are principles of general jurisprudence. *Aetna Life Ins. Co. v. Moore*, supra, at p. 559, citing *Kuhn v. Fairmount Coal Co.*, 215 U. S. 39.

It is interesting to note that the principles announced have the unanimous support of the lower federal courts.[1]

The great majority of the state courts support this proposition. In fact many of them go further and hold: that even in the absence of provisions in the contract limiting the agent's authority, the knowledge of an agent concerning matters material to the risk is not to be imputed to his principal and that an agent has not authority to waive grounds which the principal may have of declaring a forfeiture.[2]

Or that when the agent's authority is expressly limited in the contract, the knowledge of a *general* agent concerning matters material to the risk, is not imputed to his principle and that a general agent has

[1] *Supreme Council of Royal Arcanum v. Taylor* (1904) 121 Fed. 66;
Modern Woodmen of America v. Tevis (1902) 117 Fed. 309;
Mallinkrodt v. Royal Insurance Co. of Liverpool, England (1908) 160 Fed. 833;
Crenshaw & Brough Co. v. St. Paul Fire & Marine Ins. Co. (1923) 5 Fed. (2nd) 489;
Fire Association of Philadelphia v. Nunes (1925) 9 Fed. (2nd) 28;
Boston Insurance Co. v. Hudson (1926) 13 Fed. (2nd) 961;
Northern Assurance Company of London v. Case (1926) 12 Fed. (2nd) 261;
Hartford Fire Ins. Co. v. Nunes (1926) 12 Fed. (2nd) 373;
West End Hotel Co. v. American Fire Ins. Co. of N. Y. (1896) 74 Fed. 514;
West Thurston et al. v. Maryland Casualty Co. at Baltimore (1910) 181 Fed. 49;
Lake Borgne S. I. Ins. Co. v. Hough (1901) 110 Fed. 524;
Carothers v. Missouri Mut. I. Ins. Co. (1901) 108 Fed. 487.

[2] *Iowa*
Gunderson v. Merchants & Farmers Ins. Co. 81 Ia. 727, 45 N. W. 1047;
Dodds v. Scandinavian Fire Ins. Co. 94 Ia. 424, 62 N. W. 798.
Michigan
Bonnicastle v. North. Ins. Co. of Scotland (1911) 167 Mich. 274, 132 N. W. 1067.
New York
Bailey v. Workingmen Mut. Fire Ins. Co. 184 N. Y. 432, 77 N. E. 398. Approved in
Wilkinson v. Security Fire Ins. Co. 220 N. Y. 447, 116 N. E. 74.
Rhode Island
Sullivan v. Firemen's Ins. Co. 1920, 42 R. I. 433, 108 Atl. 579;
Reed v. Equitable Ins. Co. 17 R. I. 785, 24 Atl. 833.

not authority to waive grounds which the principal may have of declaring a forfeiture.

When the agent's authority is expressly limited in the contract, the knowledge of a *soliciting* agent concerning matters material to the risk is not imputed to his principle and a soliciting agent has not authority to waive grounds which the principal may have of declaring a forfeiture.

---

(1) Iowa:
Ruthven v. American Fire Ins. Co. 92 Ia. 330, 60 N. W. 663;
Zimmerman v. Home Ins. Co. of New York, 77 Ia. 691, 42 N. W. 502.
Michigan:
Cook v. Standard L. & A. Ins. Co. 84 Mich. 2, 47 N. W. 568.
Oklahoma:
Gist v. Ins. Co. 35 N. C. 10, 98 Pac. 87, 99 Pac. 869.
West Virginia:
Morgan v. Ins. Coal Ins. Co. 1917 So. W. Va. 1, 92 S. E. 84.
(2) Alabama:
Powell v. Prudential Ins. Co. of Am. 153 Ala. 611, 45 So. 208.
California:
Iverson v. Metropolitan Life Ins. Co. 153 Cal. 740, 91 Pac. 609;
Silverman v. Continental Ins. Co. 167 Cal. 137, 138 Pac. 708.
Georgia:
New York Life Ins. Co. v. Pottle, 131 Ga. 185, 106 S. E. 183;
Thornton v. Travellers' Ins. Co. 126 Ga. 121, 42 S. E. 287.
Kansas:
Pettijohn v. St. Paul etc. Ins. Co. 100 Kan. 482, 164 Pac. 1096.
Louisiana:
Thomas v. Detroit etc. Ins. Co. 142 La. 349, 83 So. 236;
Peoples Bank of Donaldsonville v. National etc. Ins. Co. 130 La. 931, 58 So. 826.
Massachusetts:
Hayes v. Metropolitan Life Ins. Co. 230 Mass. 476, 128 N. E. 780;
Porter v. U. S. Life Ins. Co. 160 Mass. 181, 35 N. E. 678.
Maryland:
Crook v. New York Life Ins. Co. 112 Md. 208, 75 Atl. 388.
Michigan:
Kirkham v. Am. Mut. Accid. Assn. 117 Mich. 321, 76 N. W. 5.
Mississippi:
New York Life Ins. Co. v. O'Dom, 106 Miss. 211, 63 So. 429.
Montana:
Collins v. Metropolitan Life Ins. Co. 52 Mont. 329, 80 Pac. 606.
New York:
McCormick v. Security Mut. Life Ins. Co. 220 N. Y. 447, 116 N. E. 24.
Ohio:
Ohio Farmers' Ins. Co. v. Tyler, 82 Oh. St. 161, 92 N. E. 82.
Oklahoma:
Modern Woodmen v. Wroblin, 42 Okl. 22, 139 Pac. 1118;
Merchants & Planters Ins. Co. v. Marsh 34 Okl. 453, 125 Pac. 1100.
Texas:
Northwestern Nat. Ins. Co. v. Muse (Tex. Civ. App.) 34 S. W. 670.
South Carolina:
Rath v. New York Life Ins. Co., 188 S. C. 137, 93 S. E. 211.

There are a few state courts, however, that disagree with the principles announced.[7]

THIRD

WHETHER IN VIEW OF THE STIPULATIONS OF THE POLICY, SUCH PROPOSITIONS OF GENERAL JURISPRUDENCE ARE CHANGED OR ABROGATED BY THE STATUTES OF OREGON REFERRED TO. WE CONTEND THEY ARE NOT.

The statutes of Oregon do not purport to define or enlarge the powers of insurance agents.

We believe the relation of the insurance agent to his principal and to the insured and the relation of the insured to each of them, respectively, to be a matter of general jurisprudence and, therefore, since it is not a rule of property it is not controlled in the federal courts by state statutes. (*Prudential Ins. Co. v. Moore*, supra.)

We find this aptly phrased by the Circuit Court of Appeals for the Sixth Circuit in *Hartford Fire Ins. Co. v. Nance*, 12 Fed. (2nd) 575:

[7] Arkansas:
People's Ins. Assn. v. Keane, 70 Ark. 310, 96 S. W. 566;
Excelsior Home Ins. Co. v. Bridges, 92 Ark. 11, 11 S. W. 1016.
Florida:
Southern States Fire Ins. Co. v. Yates, 60 Fla. 349, 48 So. 647.
Illinois:
Phoenix Ins. Co. v. Burt, 249 Ill. 513, 36 N. E. 996.
Nebraska:
Grand View Bldg. Assn. v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 246.
North Carolina:
Bullard v. Peel F. Ins. Co., 93 N. C. 340, 180 N. C. 34, 126 S. E. 179;
Johnson & Stroud v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124;
Fishblate v. F. & C. Co. of New York, 140 N. C. 589, 53 S. E. 354.

[8] *Mutual Life Ins. Co. v. Hillmon*, 241 U. S. 613;
Makowski v. Royal Ins. Co., 163 Fed. 868;
Maryland Casualty Co. v. Campbell, 255 Fed. 437;
Keelon v. Jefferson Standard Life Ins. Co., 5 Fed. (2nd) 183;
Hartford Fire Ins. Co. v. Nance, 12 Fed. (2nd) 575;
Hartford Fire Ins. Co. v. Jones, 15 Fed. (2nd) 4.

> "We think the State law does not control, because neither the validity of the contract nor any statute of the state nor local rule of property is involved. The contract was valid under the Ohio law. What we must finally determine is not a matter of validity or interpretation: it is whether the terms of a written contract, where the contract itself prohibits modification except in writing may be valid by parole evidence for the purpose of asserting estoppel. *This, we think, is a matter of general jurisprudence.*"

And the court there proceeds to hold that a statute of Ohio, similar in effect to the statute of Oregon here involved, in making the person soliciting the insurance the agent for the company would *not* prevent the company from relying upon a misrepresentation contained in the application though the true situation was known to the agent.

The same court adhered to its position in the case of *Hartford Fire Ins. Co. v. Jones*, 15 Fed. (2nd) 1.

This court has not gone so far as to directly hold under the precise circumstances that the scope of the relation of the insurer to its agent and of the insured to both is a matter of general jurisprudence, but was content to say in the case of *Mutual Life Ins. Co. v. Hilton-Green* that such statutes do not attempt to fix the scope of the authority of the agent; and for this case that is far enough. It *may* be within the province of a state legislature to provide that a person who solicits insurance shall be the agent of the company, although the relation is often one of brokerage rather than agency, but in this case we are not forced to discuss that subject, as it is conceded that Coblenz was the soliciting agent of the defendant insurer, and

that is all the statute purports to provide. The scope of the authority of the agent is still a matter of contract and, therefore, the character and limits of the agent's authority are regulated by the contract and principles of general jurisprudence already referred to. Such is the rule laid down by this court in *Mutual Life Ins. Co. v. Hilton-Green*, as follows:

> "Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations; and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud. Moulor v. American L. Ins. Co., 111 U. S. 335, 345, 28 L. ed. 447, 450, 4 Sup. Ct. Rep. 466; Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 189, 30 L. ed. 644, 646, 7 Sup. Ct. Rep. 500; Aetna L. Ins. Co. v. Moore, 231 U. S. 543, 556, 557, 58 L. ed. 356, 365, 366, 34 Sup. Ct. Rep. 186; May, Ins. 4th ed. § 181.
>
> "The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing. Distilled Spirits (Harrington v. United States) 11 Wall. 356, 367, 20 L. ed. 167, 171; American Surety Co. v. Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 985, 18 Sup. Ct. Rep. 552; American Natl. Bank v. Miller, 229 U. S. 517, 521, 522, 57 L. ed. 1310, 1312, 1313, 33 Sup. Ct. Rep. 883; Mechem, Agency 2d ed. § 1815.
>
> "*Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons*

who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and the third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power. We assume Hogue, Torrey, and the medical examiners were in fact designated agents of the company, with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. (Italics ours.) See Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 33 L. ed. 341, 343, 10 Sup. Ct. Rep. 87; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, 103; Wood v. Firemen's F. Ins. Co., 126 Mass. 316, 319; John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 234, 235, 37 L. R. A. 131, 70 N. W. 84.

"The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties. New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 529, 533, 534, 29 L. ed. 934, 939, 940, 6 Sup. Ct. Rep. 837; Northern Assur. Co. v. Grand View Bldg. Asso., 183 U. S. 308, 361, 46 L. ed. 213, 234,

22 Sup. Ct. Rep. 133; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503.

"Considered with proper understanding of the law, there is no evidence to support a verdict, against petitioner, and the trial court should have directed one in its favor."

It will be observed this court cites *Continental Life Insurance Co. v. Chamberlain*, 132 U. S. 304, in support of its decision that the statutes of Florida do not define or fix the scope of the agency, although it has been cited to the contrary in some of the state courts. It is, however, entirely consistent with and in support of the decision of this court in the case of *Mutual Life Insurance Co. v. Hilton-Green*. In the *Chamberlain* case, one of the questions asked of the insured in his application was whether he had any other insurance on his life. The answer, written by the agent, was "No other". In fact, the insured had certain *certificates of membership in certain cooperative societies*, which fact he stated to the agent and the question arose between them as to whether these certificates did or did not constitute other insurance and it was agreed between them that it did not. Hence, the answer "No other" was written in the application.

This court says (pp. 311, 312):

"It is true that among the 'Provisions and Requirements', printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy and in the application, and 'none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated'.

> But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. *The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the Company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not preclude the insurance in cooperative societies.* In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the Company is estopped, by every principle of justice, from saying that its question embraced insurance in cooperative associations. *The answer of "No other"* having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, *should be held as properly interpreting both the question and the answer as to other insurance."*

In the present case, Coblentz admittedly was the agent of the insurer, but his authority as such was limited. Whether a state statute might constitutionally enlarge or modify those limits is beside the question. Neither in the *Chamberlain* case, the *Hilton-Green* case, nor in this, does the statute purport to enlarge or modify or prescribe the limits of the agency or the powers of the agent. The Oregon statute says merely:

> "Any person who shall solicit and procure an application for life insurance, shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded the agent of the company issuing the policy and not the agent of the insured * * *."

It does not purport to say that the agent shall not have the power to waive or modify the provisions of the application, nor does it purport to say that the knowledge of the agent shall in any respect be the knowledge of the principal. That is, advisedly, left open to be regulated and conditioned by the parties themselves as evidenced in the application.

FOURTH.

WHETHER INFORMATION TO COBLENTZ, THE SOLICITING AGENT OF THE INSURER, IN VIEW OF THE STIPULATIONS OF THE POLICY AND THE PRINCIPLES DISCUSSED IN SECTIONS TWO AND THREE HEREIN, SATISFIES THE REQUIREMENT THAT ANY CHANGE IN THE PHYSICAL CONDITION OF THE APPLICANT MUST BE BROUGHT TO THE ATTENTION OF THE INSURER. WE CONTEND IT DOES NOT.

The stipulations of the application to the effect that the knowledge of the agent shall not be the knowledge of the principal and that the agent has no power to make, modify, or discharge the contract of insurance, or to bind the company by making any promises respecting any benefits under the policy, operated prospectively.

If the propositions already discussed are true, then it must follow that the insured must bring any change in his physical condition occurring between the ap-

plication and the consummation of the contract to the knowledge of the officers of the insurer, not merely to the soliciting agent.

In *principle* the doctrine of the decision of this court in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, is apposite.

The application here was made a part of the policy (Transcript p. 23, 8). When the policy was delivered into the hands of Stipcich, the insured, he would see immediately that no mention was made in the application of his changed condition of health, and he must immediately know one of two things: either that he did not notify Coblentz of his changed condition, or, if he did, Coblentz had not conveyed it to his principal, the company. It would be then his duty as said by this court in the *Fletcher* case to call that circumstance to the attention of the insurer.

This court says in the *Fletcher* case:

> "There is another view of this case equally fatal to a recovery; assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the Company, and it would have been his duty to make the fact known to the Company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.
>
> "The court charged the jury that if the assured had discovered the fraud before the policy was

delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated; a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctifying it."

If, as said by this court in the case of *M'Lanahan v. The Universal Insurance Co.*, 1 Pet. 170, the relation of the parties to an insurance contract is one of mutual good faith and confidence, and if the applicant (in this case Stipcich), observed that his policy was based upon his original application, without any amendment or modification concerning his changed condition of health, then *good faith* on his part demanded that he return the policy with the request that such amendment or notation be endorsed thereon, so that in the event of his death the clear understanding of the parties will be evidenced by the policy.

Again, if, apart from the mere question of good faith, the insurer had the right and power to stipulate in the first instance that the knowledge of the soliciting agent should not be the knowledge of the insurer, then it is clear that that power and right continues throughout to the consummation of the contract, i. e., delivery of the policy and payment of the premium, and, in the absence of affirmative proof

that the information concerning the changed condition of health actually penetrated beyond the knowledge of the soliciting agent to the officials of the Company, then, upon principles of law already discussed, no recovery may be had. In other words, both good law and good faith united to preclude a recovery.

It would be little less than idle to uphold an agreement in a life insurance application denying to the principal the imputed knowledge of information given to the agent only to a period anterior the application. If these stipulations are valid at one time they must be at another. Direct knowledge to the insurer is as important posterior the application and before the consummation of the contract as it is anterior the application.

Suppose the applicant, having knowledge or at least suspicions that all is not well with him, makes out and signs an application for insurance without disclosing his condition or his suspicions. He then, the following day, receives medical confirmation of his knowledge or suspicion and relates it to the agent. Is not the position of the insurer in such case the same as if the agent's knowledge is acquired anterior to or contemporaneously with the application?

That is exactly what happened in this case. Stipcich knew on the Saturday preceding that his stomach was troubling him again. He concealed this information from the agent—this in itself constituting misrepresentation—then subsequently, he went to his physician and received confirmation of his suspicions that in all probability his ulcer had returned. He had

further examination, an operation, and died (Certificate p. 3, fol. 3.) So far as the insurer is concerned, the effect of these circumstances upon its action upon the application is exactly the same as if Coblentz, the soliciting agent, had the information prior to the making of the application, and it was not disclosed in the application. In other words, the position of the insurer is the same whether the information came to the agent before or after the date of the application; and the stipulations of the application should be given the same weight and effect. When the reason is the same the rule should be the same.

It is respectfully submitted that the question should be answered in the negative.

Dated, San Francisco,
September 14, 1927.

F. Eldred Boland,
Samuel Knight,
Attorneys for Defendant in Error.

FILED
FEB 27 1928
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 97

JOSEPHINE STIPCICH,
Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

SUPPLEMENTAL AND REVISED BRIEF FOR DEFENDANT IN ERROR.

F. ELDRED BOLAND,
SAMUEL KNIGHT,
Balfour Building, San Francisco,
Attorneys for Defendant in Error.

Francis-Valentine Company, San Francisco

Subject Index

Page

First.

The representations made by an applicant for life insurance must be true as of the time of the consummation of the contract and if there is any change in the physical condition of the applicant material to the risk occurring between the making of the application and the consummation of the contract, it is imperative upon him to notify the insurer..... 6

Second.

The policy is the entire contract; including the representations in the application as to the condition of health of Stipcich at the time the policy was delivered..... 10

Third.

The policy as issued and delivered does not in reality state the entire contract; it omits to mention the changed condition; a very important, even paramount, element of the contract..... 12

Fourth.

It was the duty of Stipcich to read the contract and take exception to the fact of this important omission. If he had read it, as it was his duty to do, he would have known one of two things had happened,—either..... 13

(A) He had not made known his changed condition at all, which would be a fraud on his part, or..... 13

(B) He would have known that Coblentz, the agent, had omitted to mention it to the insurance company, which would be a fraud on the agent's part and which Stipcich, by either failing to read the policy or, having read it, failing to object to the omission, adopted by his silence..... 13

Fifth.

An insurer has the right to limit its agents' authority and to provide that the knowledge of the soliciting agent concerning matters material to the risk shall not be imputed to the principal 16

Table of Authorities Cited

Pages

Aetna Life Insurance Co. v. Moore, 231 U. S. 543.....23, 26

British Equitable Ins. Co. v. Great Western R. Co., 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561..... 7

Cable v. U. S. Life Ins. Co., 111 Fed. 19..... 6
Canning v. Farquhar, L. R. 16 Q. Div. 727..... 7
Carleton v. Patrons A. M. Fire Ins. Co., 109 Me. 79, 82 Atl. 649 6

Equitable Life Ass. Soc. v. McElroy, 83 Fed. 631.....6, 7, 23

Graham v. General Mutual Ins. Co., 6 L. A. Ann. 4832..... 6

Harris v. Security Mutual Life Ins. Co., 130 Tenn. 325, 170 S. W. 474 6
Hart v. British & F. M. Ins. Co., 80 Cal. 440, 22 Pac. 302..... 6
Hartford Fire Ins. Co. v. Jones, 15 Fed. (2d) 1..... 26
Hartford Fire Ins. Co. v. Nance, 12 Fed. (2d) 575..... 26

Laws of Oregon, Sections 6422, 6426..... 11

M'Lanahan v. Universal Ins. Co., 1 Pet. 170..... 6, 8
Mutual Benefit Life Ins. Co. v. Higginbotham, 95 U. S. 380..... 9
Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, at pages 622, 623 .....13, 15, 25

Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308, 364 .....16, 20
New York Life Insurance Company v. Fletcher, 117 U. S. 519...13, 19

Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377..... 6

Thompson v. Travelers Ins. Co., 13 N. D. 444, 101 N. W. 900.... 6
Traill v. Baring, 4 De G. J. & S. 318, 10 L. T. N. S. 215, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 377, 12 Week. Rep. 678..... 6

Watson v. Delafield, 2 Caines 224, 1 Johns. 150, 2 Johns. 526.... 6
Whitley v. Piedmont & A. L. Ins. Co., 71 N. C. 480..... 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 97

JOSEPHINE STIPCICH,
Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

SUPPLEMENTAL AND REVISED BRIEF FOR DEFENDANT IN ERROR.

On February 16, 1924, Anton Stipcich, of Astoria, Oregon, called upon his family physician, Dr. Toivo Forsstron, who had operated on him for duodenum ulcer some two years previous, complaining of pain and distress after eating (T. 87). Dr. Forsstron gave Stipcich a prescription which was filled the same day (T. 80).

Later in the afternoon of the same day, Stipcich, with his wife, called at the office of the Metropolitan Life Insurance Company at Astoria and there met

Mr. Julien Coblentz, an agent of the Insurance Company, stating that he was then ready to apply for the life insurance for which Coblentz had been canvassing him for some time. An appointment was made at the Stipcich home for the following day to prepare the application (T. 77).

On the following day, February 17, Sunday, Coblentz called at the Stipcich home and took his application for the life insurance in question (T. 77).

On the next day, ~~March~~ February 18, Stipcich attended upon the medical examiner of the defendant Insurance Company for his medical examination to complete his application as to his health (T. 98). He there disclosed the operation some two years previous (T. 32), but *denied the consultation with Dr. Forsstron on the day previous* (T. 34, 35).

Dr. Forsstron had told Stipcich he were not relieved to come back later, which he did, and was advised by Dr. Forsstron that he should have an "X-ray" (the doctor being suspicious of a recurrence of the ulcer) (T. 91).

On March 7th, Stipcich went to Portland and there consulted a Dr. Sommer, who sent him to the hospital for an "X-ray" examination and observation. Stipcich remained at the hospital from March 8th to March 14th (T. 93); and as a result of this examination and the "X-ray", Dr. Sommer advised him that he had an ulcer for which he should have an operation (T. 94).

Again, on March 20th (T. 82), Stipcich went to Portland to the office of Dr. Coffey and was there

examined by a Dr. Slater, an associate of Dr. Coffey. Here he had another "X-ray" examination and was advised by Dr. Slater that he had a stomach (peptic) ulcer (T. 84).

On March 26th, Stipcich, this time accompanied by his wife, considering whether he should undergo the operation, again went to Portland and again consulted with the physicians concerning their advice that he was afflicted with an ulcer (T. 108).

On March 26th, while Stipcich and his wife were in Portland receiving confirmation of the diagnosis that he was afflicted with an ulcer and should have an operation, the Insurance Company issued the policy in question (T. 10) and it was later (the exact date does not appear, but probably March 29th) delivered and the premium paid.

On April 5th, Stipcich went on the operating table (T. 109), dying shortly thereafter from peritonitis resulting from the operation (T. 97).

Testimony was offered by the plaintiff to the effect that Mrs. Stipcich told Coblentz, the soliciting agent of defendant Insurance Company, "that after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the doctor had recommended an operation, possibly for an ulcer; that the doctor had said he didn't know whether it was an ulcer, but thought it was" (T. 105).

Other than this, no information of the ulcerous condition of Stipcich was given the Insurance Company.

The application was at no time altered to show the visit of Stipcich to Dr. Forsstron on February 16th, the day previous to his application for insurance, nor to include any relation of the altered physical condition of Stipcich as developed in his consultations with Dr. Sommer and Dr. Slater; and the policy was delivered to and accepted by Stipcich with the application in its original form affixed to and made a part of the policy.

Under these facts the defendant contends:

First: Stipcich was under an obligation to inform the defendant Insurance Company of his changed physical condition and of the advice given him by his physicians. That proposition is thoroughly entrenched behind the authority of this Court.

Second: The policy is the entire contract; including the representations in the application as to the condition of health of Stipcich at the time the policy was delivered.

Third: The policy as issued and delivered does not in reality state the entire contract; it omits to mention the changed condition; a very important, even paramount, element of the contract.

Fourth: It was the duty of Stipcich to read the contract and take exception to the fact of this important omission. If he had read it, as it was his duty to do, he would have known one of two things had happened,—either

(a) He had not made known his changed condition at all, which would be a fraud on his part, or

(b) He would have known that Coblentz, the agent, had omitted to mention it to the Insurance Company, which would be a fraud on the agent's part and which Stipcich, either by failing to read the policy or, having read it, by failing to object to the omission, adopted by his silence.

Fifth: (a) It is the fact, regardless of the law of Oregon, that Coblentz was the agent of the defendant Insurance Company for the soliciting of the insurance and delivery of the policy; but

(b) The Oregon law does not in any manner or to any extent attempt to define the scope of the agency or prescribe the power of the agent, or to alter the rule that the insured by accepting the policy, adopted and confirmed the fraud either of himself if he did not tell Coblentz of his changed condition, or of Coblentz if the latter did not tell defendant Insurance Company.

FIRST.

THE REPRESENTATIONS MADE BY AN APPLICANT FOR LIFE INSURANCE MUST BE TRUE AS OF THE TIME OF THE CONSUMMATION OF THE CONTRACT AND IF THERE IS ANY CHANGE IN THE PHYSICAL CONDITION OF THE APPLICANT MATERIAL TO THE RISK OCCURRING BETWEEN THE MAKING OF THE APPLICATION AND THE CONSUMMATION OF THE CONTRACT, IT IS IMPERATIVE UPON HIM TO NOTIFY THE INSURER.

M'Lanahan v. Universal Ins. Co., 1 Pet. 170;

Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377;

Equitable Life Ass. Soc. v. McElroy, 83 Fed. 631;

Cable v. U. S. Life Ins. Co., 111 Fed. 19;

Watson v. Delafield, 2 Caines 224, 1 Johns 150, 2 Johns 526;

Whitley v. Piedmont & A. L. Ins. Co., 71 N. C. 480;

Thompson v. Travelers Ins. Co., 13 N. D. 444, 101 N. W. 900;

Graham v. General Mutual Ins. Co., 6 L. A. Ann. 4832;

Hart v. British & F. M. Ins. Co., 80 Cal. 440, 22 Pac. 302;

Carleton v. Patrons A. M. Fire Ins. Co., 109 Me. 79, 82 Atl. 649;

Harris v. Security Mutual Life Ins. Co., 130 Tenn. 325, 170 S. W. 474;

Traill v. Baring, 4 De G. J. & S. 318, 10 L. T. N. S. 215, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 377, 12 Week. Rep. 678;

British Equitable Ins. Co. v. Great Western R. Co., 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561;

Canning v. Farquhar, L. R. 16 Q. Div. 727.

Justice Sanborn said in *Equitable Life Ass. v. McElroy*, 83 Fed. 631:

"Fraud vitiates all contracts. But misrepresentations or concealments of the facts relative to the health of those whose lives are insured are peculiarly fatal to contracts of life insurance, because the companies necessarily rely upon the statements and acts of the assured in making their contracts. Companies cannot know and surgeons cannot discover by the appearance and examination of subjects many insidious and often fatal diseases, the symptoms of which are felt by their victims. Hence the companies require them to answer many questions as to their habits, their health, their symptoms, the longevity of their ancestors, and the causes of their disease. When these have been answered, and the examining surgeon has certified to the good health of the subject and the character of the risk upon his life, these answers and this certificate become the basis of the contract. In other words, the honesty, good faith, and truthfulness of the person whose life is insured form the actual foundation of the agreement of life insurance. It is for this reason that contracts of life insurance are said to be uberrimae fidei, and any material misrepresentation or concealment is fatal to them. When the representation of good health and the certificate of the surgeon have been made, and the contract is not immediately closed, but negotiations for it continue, and proposals and counter proposals are made, but for some time none are accepted, the representation and certificate continue and condition all the proposals and the ultimate contract, when it is closed. They

are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. *The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty, and truthfulness, impose upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed.* An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract."

Justice Story in *M'Lanahan et al. v. The Universal Insurance Company*, 1 Pet. 170, said:

"The contract of insurance has been said to be a contract uberrimae fidei, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. *If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy.* If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the maxim applies, qui facit per alium, facit per se. His own knowledge, in such a case, infests the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And

> even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence, the information might have been communicated, so as to have countermanded the insurance, the policy is void."

In the case of *Mutual Benefit Life Ins. Co. v. Higginbotham,* 95 U. S. 380, relied upon by plaintiff in error, this Court recognizes the principle. That was a case of a revival of an expired policy, not the placing of a new policy. The insured made application for the revival of his policy and delivered a certificate of health on October 1, 1870. The revival certificate was delivered on October 14, 1870. It was contended that between October 1st and 14th, a change took place in the condition of the insured which should have been brought to the attention of the insurer. The Court says:

> "The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the first day of that month."

In other words, the Court held that the insured was not bound to communicate to the insurer changes in

his physical condition after the consummation of the contract. The Court further says:

> "*If we assume* it to be true, as a general proposition, that the policy speaks from the date of its issue, and *that the obligation of the applicant to make a full disclosure continues down to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the company, we do not advance essentially in the case before us.* The question recurs: when was the contract of Dr. Day consummated? If on the 14th day of October, when the renewal receipt was delivered, as the company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract, by the intention and understanding of the parties, relates to the first of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. *It is not necessary, therefore, to question the principle assumed in the authority quoted, or examine the cases cited to sustain it.*"

SECOND.

THE POLICY IS THE ENTIRE CONTRACT; INCLUDING THE REPRESENTATIONS IN THE APPLICATION AS TO THE CONDITION OF HEALTH OF STIPCICH AT THE TIME THE POLICY WAS DELIVERED.

It is contended by plaintiff in error that this obligation to report the changed condition in health to the Insurance Company was satisfied by communica-

tion thereof to Coblentz, the soliciting agent. It is contended by defendant in error that Coblentz, as soliciting agent, had no authority to receive or bind the Insurance Company by such knowledge; that the limitation upon his authority was contained in the application, and, therefore, it was incumbent upon plaintiff in error to communicate directly with the Insurance Company. These matters are fully covered in the briefs already filed.

Now that the Court has the entire record before it and is not limited in its consideration by the form or text of the question propounded by the Circuit Court of Appeals, the case may be considered in an entirely different aspect:

That is, assuming that the information was communicated to Coblentz and assuming his authority to receive it, does the case stand any different than it would if the information had come to Stipcich before he made the application, and he had in turn communicated it to Coblentz or the medical examiner, but the latter had failed to put the same in the application? Both the law of Oregon and the policy provide that the policy and application shall state the entire contract.

Laws of Oregon, Sections 6422, 6426;
Transcript, p. 12.

But in this case

THIRD.

THE POLICY AS ISSUED AND DELIVERED DOES NOT IN REALITY STATE THE ENTIRE CONTRACT; IT OMITS TO MENTION THE CHANGED CONDITION; A VERY IMPORTANT, EVEN PARAMOUNT, ELEMENT OF THE CONTRACT.

The policy itself provides (T. 12) that:

> "This policy (and the application therefor) constitutes the entire contract between the parties and, except for non-payment of premiums, shall be incontestable after two years from the date of its issue."

In his application Stipcich denied that he had consulted Dr. Forsstron the day previous to his application (T. 34), or that he had been treated for any illness within five years (T. 35); and he makes no disclosure on the application or on the policy that he was afflicted with stomach ulcer and had been advised to have an operation.

Upon the face of the policy as delivered and accepted Stipcich was a good risk for the amount of the insurance. In point of fact, he was not a good risk at the time the policy was delivered; and, further, he knew he was not a good risk.

He (and plaintiff) knew that the changed condition must be brought to the attention of the Insurance Company,—else why make such a point of telling Coblentz?

He knew that the fact of this changed condition must, under the law of Oregon (upon which plaintiff so much relies) and under the terms of the policy, be incorporated therein; that it was a material part of the contract.

But it was not there; something was wrong. Therefore,

FOURTH,

IT WAS THE DUTY OF STIPCICH TO READ THE CONTRACT AND TAKE EXCEPTION TO THE FACT OF THIS IMPORTANT OMISSION. IF HE HAD READ IT, AS IT WAS HIS DUTY TO DO, HE WOULD HAVE KNOWN ONE OF TWO THINGS HAD HAPPENED,—EITHER

(A) HE HAD NOT MADE KNOWN HIS CHANGED CONDITION AT ALL, WHICH WOULD BE A FRAUD ON HIS PART, OR

(B) HE WOULD HAVE KNOWN THAT COBLENTZ, THE AGENT, HAD OMITTED TO MENTION IT TO THE INSURANCE COMPANY, WHICH WOULD BE A FRAUD ON THE AGENT'S PART AND WHICH STIPCICH, BY EITHER FAILING TO READ THE POLICY OR, HAVING READ IT, FAILING TO OBJECT TO THE OMISSION, ADOPTED BY HIS SILENCE.

In the former case, (A), he would be violating his obligation as decided by this Court in the cases already cited, and in the latter case, (B), he would be violating his obligation as decided in the cases of *New York Life Insurance Co. v. Fletcher,* 117 U. S. 519, and *Mutual Life Insurance Co. v. Hilton Green,* 241 U. S. 613.

In the case of *New York Life Insurance Company v. Fletcher,* 117 U. S. 519, the action was upon a policy of life insurance in the sum of $10,000. The insured in his application made certain representations concerning his health and physical condition which were untrue and material to the risk. The beneficiary pleaded and proved that the soliciting agents of the insurer knew of the true condition of the insured and the falsity of the representations and that they had advised the insured that these repre-

sentations were but a mere formality and had inserted false answers in the application.

This Court said (p. 529):

> "It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent contract of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. * * *"

The Court further says (p. 534):

> "There is another view of this case equally fatal to a recovery; *assuming that the answers of the assured were falsified, as alleged, the fact would at once be disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.*
>
> "The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further

with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated; a doctrine without authority and wholly indefensible. *No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctifying it.*"

In the case of

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, at page 623,

Mr. Justice McReynolds said:

"The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. *Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties.* New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 529, 533, 534, 29 L. ed. 934, 939, 940, 6 Sup. Ct. Rep. 837; Northern Assur. Co. v. Grand View Bldg. Asso., 183 U. S. 308, 361, 46 L. ed. 213, 234, 22 Sup. Ct. Rep. 133; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503.

> Considered with proper understanding of the law, there is no evidence to support a verdict, against petitioner, and the trial court should have directed one in its favor."

There is, as we see it, under the foregoing authorities, no escape from the conclusion that Stipcich, by accepting the policy, either confirmed his own act in himself concealing his changed condition, or confirmed the act of the soliciting agent Coblentz in failing to transmit the information to the defendant Insurance Company. In the one event he himself perpetrated a fraud on the defendant Insurance Company; in the other, he confirmed, adopted, and approved the fraud perpetrated both upon himself and upon the Insurance Company by the agent Coblentz.

FIFTH.

AN INSURER HAS THE RIGHT TO LIMIT ITS AGENTS' AUTHORITY AND TO PROVIDE THAT THE KNOWLEDGE OF THE SOLICITING AGENT CONCERNING MATTERS MATERIAL TO THE RISK SHALL NOT BE IMPUTED TO THE PRINCIPAL.

But the defendant Insurance Company goes further. It stipulates that the knowledge of its agents shall *not be its knowledge*. That such a limitation is as a matter of law reasonable, we shall soon see; but that it is reasonable as a matter of fact also has been held by this Court.

Northern Assurance Co. v. Grand View Building Ass., 183 U. S. 308, 364,

where the Court says:

> "Besides the importance of such considerations to the parties immediately concerned in business

> transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. *It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony.* Increased importance should be given to the rules involved in this discussion by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy."

The practical importance of this principle (and that all matters pertaining to the contract be contained therein) is emphasized by the fact (off the record) that defendant Insurance Company had on December 31, 1927, forty million one hundred sixty-six thousand one hundred seven (40,166,107) policies of life insurance in force. It can rely only on written statements made to it and incorporated in the policy when issued; and the good faith and co-operation of its policyholders is absolutely essential to its fair and impartial service to its policyholders. Local laws and regulations often overlook that the interests of these forty million policies are paramount to the supposed interests of a small few who would perhaps take advantage of the rest. The Insurance Company must by adequate limitation protect these forty million policies from the fraud and carelessness of the few and from the occasional acts of its own agents.

The policy as delivered to and accepted by Stipcich contained the following (T. 12):

> "This policy (and the application therefor) constitutes the entire contract between the parties."

The application provided (T. 28):

> "2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting *any benefits* under any policy issued hereunder.
>
> 3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

The policy and application spoke as of the date of its delivery to and acceptance by Stipcich.

The application did not speak as of the 17th of February, the day it was filled out by Coblentz (T. 29), or the 18th of February, the day he appeared before the medical examiner (T. 36); it spoke as of the date the contract was consummated, about March 29th, and as delivered to and received by Stipcich. The policy itself stipulated that no information to or knowledge of Coblentz or any other agent was binding upon the defendant Insurance Company, unless contained in the application; so that it could be thereby made an integral part of the contract and so that the contract could speak the entire intent and obligation of the parties.

That such a limitation of authority is valid is now undoubted under the decisions of this Court.

In the case of *New York Life Insurance Company v. Fletcher,* 117 U. S. 519, the action was upon a policy of life insurance in the sum of $10,000. The insured in his application made certain representations concerning his health and physical condition which were untrue and material to the risk. The beneficiary pleaded and proved that the soliciting agents of the insurer knew of the true condition of the insured and the falsity of the representations and that they had advised the insured that these representations were but a mere formality and had inserted false answers in the application.

The application, however, provided that:

> "No statements or representations made or information given to a person soliciting or taking the application of the policy, shall be binding on the company or in any manner affect its rights unless they are reduced to writing and presented at the home office with the application."

This Court said (p. 529):

> "It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent contract of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith,

justice would require that the contract be canceled and the premiums returned. * * *

If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. *The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.*"

The Court went on to say (p. 531):

"The present case is very different from *Ins. Co. v. Wilkinson,* 13 Wall. 222 (80 U. S. bk. 20, L. ed. 617), and from *Ins. Co. v. Mahone,* 21 Wall. 152 (88 U. S. bk. 22, L. ed. 593). In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. *Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements.*"

The opinion of this Court in the case of *Northern Assurance Co. v. Grand View Building Association,*

183 U. S. 308, crystallizes the law upon the subject. That case involved a policy of fire insurance which provided (p. 311) that it should be void if the insured had other insurance on the property covered thereby. The plaintiff (insured) did have other insurance, but claimed that the insurer's agent had been informed of the fact, and pleaded a waiver and estoppel to set up the fact of other insurance in defense of the action upon the policy. *The policy further provided* (p. 312) *that no officer or agent had the power to waive any of the conditions or provisions except and unless endorsed on the policy.*

The Court reviews the cases on the subject and announces the principles applicable (p. 361):

> "They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; *that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered;* that where fire insurance policies contain provisions whereby agents may, by

writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

The Court then applies the principles to the case then before it, saying (p. 363):

"It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in other company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. *In other words, the contention is that an agent with no authority to*

dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured."

The Court concludes the opinion by stating (p. 364):

"Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. *It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony.* Increased importance should be given to the rules involved in this discussion by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy."

The case of the *Aetna Life Insurance Co. v. Moore,* 231 U. S. 543, is to the same effect. The insured, one Salgue, applied to the Aetna Life Insurance Company for a policy on his life. The policy provided, among other things:

"No agent or other person not an executive officer can waive any of the conditions of this policy, nor make any agreement binding upon said company."

The insured represented himself in good health, but was, in fact, found to be afflicted with heart

disease, and upon this ground the insurer resisted payment of the policy. Plaintiff claimed, however, that Salgue had correctly informed the medical examiner of his condition.

The Court says (pp. 559-560):

"It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German-American Mut. Life Asso. v. Farley, supra, is also cited, and being a Georgia case, its authority is especially urged.

There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner, or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice or knowledge of' the company, 'or as charging it with any liability by reason thereof'. And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by Northern Assur. Co.

v. Grand View Building Asso., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso., 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312."

The statute of Oregon, relied upon by plaintiff in error, is not in conflict with these principles. It does not purport to define the powers of the agent nor restrict the Insurance Company from limiting those powers. It provides:

> "Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded the agent of the company issuing the policy and not the agent of the insured. * * *"

Defendant Insurance Company admits, regardless of the statute, that Coblentz was its agent for the solicitation of the application for and delivery of the policy.

This Court has already determined in the case of *Mutual Life Insurance Co. v. Hilton Green*, 241 U. S. 613, at page 622, that such a statute does not purport to define the authority or enlarge the power of the agent. This Court there says:

> "The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his prin-

cipal. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing. Distilled Spirits (Harrington v. United States), 11 Wall. 356, 367, 20 L. ed. 167, 171; American Surety Co. v. Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 985, 18 Sup. Ct. Rep. 552; American Natl. Bank v. Miller, 229 U. S. 517, 521, 522, 57 L. ed. 1310, 1312, 1313, 33 Sup. Ct. Rep. 883; Mechem, Agency, 2d ed., § 1815.

Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and the third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power. We assume Hogue, Torrey, and the medical examiners were in fact designated agents of the company, with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. (Italics ours.) See Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 33 L. ed. 341, 343, 10 Sup. Ct. Rep. 87; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, 103; Wood v. Firemen's F. Ins. Co., 126 Mass. 316, 319; John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 234, 235, 37 L. R. A. 131, 70 N. W. 84."

See also:

Hartford Fire Ins. Co. v. Nance, 12 Fed. (2d) 575;

Hartford Fire Ins. Co. v. Jones, 15 Fed. (2d) 1.

That such a statute does not and cannot alter the rule is shown in *Aetna Life Insurance Co. v. Moore*, 231 U. S. 543. This Court there considered the effect of a limitation upon the authority of the agent (like

the statute), *considering him as the agent of the company and not of the insured,* and holds such limitation proper and binding.

The Court says at pages 558-559:

> "It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, *he will be regarded in so doing as the agent of the company, and not the agent of the insured.* Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German-American Mut. Life Asso. v. Farley, supra, is also cited, and being a Georgia case, its authority is especially urged.
>
> *There are, however, later cases which enforce the provisions of a policy,* and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner, or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice or knowledge of' the company, 'or as charging it with any liability by reason thereof'. And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.
>
> *The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by* Northern Assur. Co. v. Grand View Building Asso., 183 U. S. 308, 46

L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso., 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312."

Here Stipcich, having knowledge or at least suspicions that all is not well with him, makes out and signs an application for insurance without disclosing his condition or his suspicions. He then, the following day, receives medical confirmation of his knowledge or suspicion and relates it to the agent. Is not the position of the insurer in such case the same as if the agent's knowledge is acquired anterior to or contemporaneously with the application?

That is exactly what happened in this case. Stipcich knew on the Saturday preceding that his stomach was troubling him again. He concealed this information from the agent—this in itself constituting misrepresentation—then subsequently, he went to his physician and received confirmation of his suspicions that in all probability his ulcer had returned. He had further examination, an operation, and died. So far as the insurer is concerned, the effect of these circumstances upon its action upon the application is exactly the same as if Coblentz, the soliciting agent, had the information prior to the making of the application, and it was not disclosed in the application. In other words, the position of the insurer is the same whether the information came to the agent before or after the date of the application; and the stipulations of the application should be given the same weight and effect. When the reason is the same the rule should be the same.

The application and the representations therein must speak as of the date of the consummation of the policy and must then be true. If it is not true then it is the duty of the applicant to reject it as not stating the entire contract of the parties. Nothing less will satisfy the requirements of good faith, honest dealing and legal relations.

Dated, San Francisco,
February 20, 1928.

Respectfully submitted,
F. ELDRED BOLAND,
SAMUEL KNIGHT,
Attorneys for Defendant in Error.